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ACTION OF EJECTMENT,

THE RESOLVING ACTION FOR

MESSY PROPOS

THE JUDICIAL SYSTEM

WITH CONSIDERABLE ADDITIONS

By JOHN ADAMS

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CHIEF CLERK OF THE SUPREME COURT

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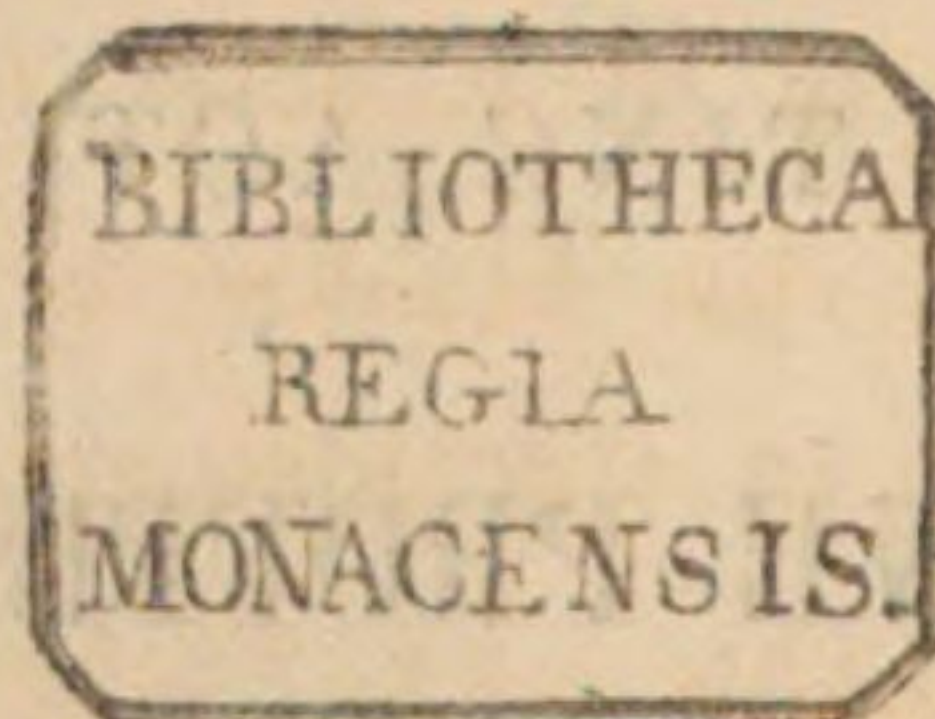
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A
TREATISE
ON THE
PRINCIPLES AND PRACTICE
OF THE
ACTION OF EJECTMENT,
AND
THE RESULTING ACTION FOR
MESNE PROFITS.

The Fourth Edition,
WITH CONSIDERABLE ADDITIONS.

BY JOHN ADAMS,
SERJEANT AT LAW, PAT: PRE:
AND
ASSISTANT JUDGE OF THE MIDDLESEX SESSIONS.

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PREFACE

TO THE

FOURTH EDITION.

UPWARDS of thirty years have elapsed since the Author first offered this Treatise to the Profession—an eventful period in the history of English Law. And it is a remarkable fact, that whilst the entire practical machinery in every other action has been reconstructed, and the rules for pleading remodelled, the proceedings in the action of Ejectment have remained unaltered; a circumstance probably to be attributed to the anomalous nature of the action, which gives to the Courts at all times an uncontrolled power of regulating its proceedings and supplying its deficiencies.

Two important statutes connected with the subject of this Treatise, namely, stat. 3 & 4 Wm. 4, c. 27, “for the Limitation of Actions and Suits relating to Real Property,” and stat. 3 & 4 Wm. 4, c. 74, “for the Abolition of Fines and Recoveries,” have

however received the sanction of Parliament since the publication of the third edition: the first part of the chapter which treats of the Title Necessary to Support the Action has, in consequence, been re-written, and the chapter relating to Actual Entry omitted.

Material alterations have also been made in that part of the chapter upon Evidence, which relates to the proof of the due execution of Wills; so as to adapt it to the provisions of the stat. 7 Wm. 4, and 1 Vict. c. 26, sec. 10; and the chapter upon the stat. 1 Geo. 4, c. 87, and stat. 1 Wm. 4, c. 70, for Regulating the Action of Ejectment as between Landlord and Tenant, which were scarcely in operation at the time of the publication of the last edition, has been much enlarged. The practical part of the Work has also been completely revised, and an attempt has been made to classify and reduce to order the numerous and sometimes apparently inconsistent decisions, relating to an important branch of the practical proceedings, namely, the Service of the Declaration, and the Rule for Judgment against the Casual Ejector.

1, SERJEANTS' INN, CHANCERY LANE,

June 1, 1846.

PREFACE
TO THE
FIRST EDITION.

IT has been the Author's chief endeavour, in the following pages, to investigate the principles upon which the remedy by ejectment is founded; to point out concisely the different changes which the action has undergone; and to give a full and useful detail of the practical proceedings by which it is at this time conducted. To this end the later decisions have been very fully considered; whilst a slight mention only has been made of the more ancient cases, now, for the most part, indirectly overruled, or altogether inapplicable to the modern practice.

Before the time of LORD MANSFIELD, indeed, no regular system seems to have been formed for the government of the action; and that illustrious Judge, considering an ejectment as a fiction invented for the purposes of individual justice, endeavoured to mould it into an equitable remedy, and to regulate

it by maxims, in some degree independent of the general rules of law, as well as of the practice in other actions. The erroneous principles on which this system was founded were pointed out by the late LORD KENYON; and a material alteration in the mode of conducting the action took place from the time of his Lordship's elevation to the Bench. By his sound and luminous decisions, the remedy has been placed upon its true principles; and he lived to see a system nearly completed, which, uniting the equitable fictions of the particular action with the general principles of law, has preserved unbroken the great boundaries of our legal jurisprudence, and, at the same time, rendered the remedy most useful and comprehensive. The correct principles established by this great lawyer still prevail, having been uniformly maintained, and ably illustrated, by the more recent decisions of the different Courts.

The Author has enlarged upon these circumstances, in order to account for the personal judgment he has, in some instances, found it necessary to exercise with regard to decisions anterior to the time of LORD KENYON; many cases being still extant as authorities, which seem wholly inconsistent with the modern principles of the action of ejectment.

The application of the remedy as between landlord and tenant, forms also a material part of this Treatise; and it has there been the Author's endeavour to give some useful practical directions respecting *notices to quit*, and the manner of proceeding on the forfeiture of a lease; at the same time explaining the principles upon which those directions are founded.

The evidence necessary to support and defend the action in common cases has also been considered: and instructions for proceeding according to the ancient practice have been added, as far as can be necessary at the present time.

For practical forms in ejectment, the reader is referred to those contained in Mr. TIDD's Appendix to his Practice of the Court of King's Bench: a collection which appears to the Author too complete to require addition, and too accurate to be susceptible of improvement.

5, SERJEANTS' INN, FLEET STREET,

May 1, 1812.

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ERRATA.

Page 47, line 1, for "rest" read "vest."

95, note (c), for "Duratord" read "Durnford."

101, note (b), for "Doe" read "Roe."

149, line 17, for "therefore" read "theretofore."

151, note (f), for "1 M. & M. 29" read "1 R. & M. 29."

167, note (a), for "Gerington" read "Errington."

180, note (c), for "Roe" read "Doe."

186, line 13, for "Geo. 4, c. 67" read "1 Geo. 4, c. 87."

244, note (d), for "1 East, 600" read "1 T. R. 600."

281, line 17, for "1 Wm. 4, c. 7" read "1 Wm. 4, c. 70."

281, lines 18, 19, for "1 Wm. 4, c. 87, s. 32" read "1 Geo. 4,
c. 87, s. 32."

307, line 25, for "16 & 17 Car. 2, c. 1, s. 4" read "16 &
17 Car. 2, c. 8, s. 4."

323, line 8, for "4 Geo. 1, c. 87," read "1 Geo. 4, c. 87."

A

TREATISE

ON THE

ACTION OF EJECTMENT.

CHAPTER I.

Of the Origin, Progress, and Nature of the Action of Ejectment.

THE History of the English Law abounds in illustrations of the national attachment to ancient institutions, and of the reluctance with which, however imperious the necessity, the Courts depart from established maxims. The progress of society and the consequent changes in manners and customs are continually creating new personal rights, and demanding corresponding changes in judicial proceedings; and it is an interesting inquiry, though foreign to this Treatise, to trace out the various contrivances by which the Courts have in every period of our history adapted the principles of the ancient law to the exigencies of the passing time, and ingeniously contrived remedies for wrongs, which appear to have been unknown and unthought of when the common law was first introduced. The ordinary mode by which these improvements have been effected, has been by the invention

B

of some legal fiction which leaves the original maxim untouched, but engrafts upon it some deduction by which a remedy or form of proceeding is provided for the particular wrong, and out of which a new maxim or rule springs, for the redress of future wrongs of a similar nature. Indeed it would seem that these fictions are coeval with the law itself, and form part of its simple beauty. "*In fictione legis consistit equitas*," is amongst its favourite maxims, and these fictions blend themselves with all the phases which the law has at different times assumed, and hold a conspicuous part in all judicial determinations. They may be traced in all gradations from the great constitutional fiction, giving stability to the Throne and security to the subject, which assumes that the King can do no wrong, to the amusing absurdity upon which the old Writ of *Quo minus* was founded, and which gave to the Court of Exchequer its civil jurisdiction.

The action of Ejectment stands prominently forward amongst these legal fictions. The writ upon which it is founded was not invented until the reign of Edward III., and although in its origin it was a mere action of trespass, enabling a lessee to recover damages when ousted of his possession, it has by a series of the most ingenious fictions gradually superseded and ultimately triumphed over the ancient remedies for the recovery of real property, and is now by the provisions of a recent act of the Legislature (a), which abolish, with one or two unimportant exceptions, all real actions, become the sole mode of legal proceedings in all cases where the right to real property is in dispute.

In tracing this remedy through its several gradations, it will be found continually moulding itself to the condition of the times, and extending its uses and powers, as the progress of civil society rendered necessary or convenient.

(a) 3 & 4 Wm. 4, c. 27, s. 36.

In the earlier periods of our history, estates for years, according to their present import, were unknown. Under the feudal system, war was the primary object even of legislation; and it is therefore not surprising, that the interests of the inferior tenantry were then disregarded, and the remedies for the recovery of lands altogether confined to freehold titles, vested in the superior landholders. The lords, indeed, seldom permitted their vassals to enjoy any interest in the lands they occupied, which could render them independent of their will; and, even when they did grant them a right to the possession for a determinate period, as a stimulus to increase their industry, such grants were not considered as transferring to the grantee any title to the land, but merely as agreements or contracts between the lord and his vassal.

The old writ of covenant, adapted at that time to the recovery of the term, as well as of damages, was the only remedy to which the tenants were entitled upon these leases. But this writ could only extend to cases in which there was a breach of the original contract, and the tenant was therefore without means of redress, when dispossessed of his land by the act of a stranger, not claiming under the grantor. Great difficulties also attended the proceedings upon the writ of covenant. It only lay between the immediate parties to the grant, and, as it frequently happened that the tenant was dispossessed, by a person claiming under a subsequent feoffment from his grantor, and not by the grantor himself, he was then, notwithstanding the breach of the original contract, enabled to recover only damages for the injury he had sustained, but had no means of regaining possession of the land from which he had been ousted (a).

So regardless, however, was the law, during the first ages, after the Conquest, of grants of this nature, that until the time

(a) Bracton, b. 4, f. 220.

of King Henry III. this writ of covenant remained the sole remedy of the grantee, even upon a breach of the grant. In that reign the first symptoms of a more enlightened policy appeared; and by the wisdom of the Court and council, a full remedy was provided for a termor, who was dispossessed of his land, by any person whomsoever, claiming under the title of the grantor (*a*).

The writ invented for this purpose was, according to Bracton (*a*), called the writ of *quare ejecit infra terminum*, and required the defendant to show wherefore he deforced the plaintiff of certain lands, which *A.* had demised to him for a term then unexpired, within which term the said *A.* sold the lands to the defendant, by reason of which sale the defendant ejected the plaintiff therefrom.

The language, indeed, used by Bracton (*a*), when speaking of this writ, may at first sight induce an opinion, that it was intended as a general remedy against all persons, even strangers, who ejected a lessee; and this interpretation has been adopted by a learned writer on the English law (*b*). On a minute investigation, however, it will appear that Bracton meant only to include the grantor himself, or persons claiming under him. One passage certainly militates against this conclusion, "*Si autem alius quàm qui tradidit ejecerit, si hoc fecerit cum AUTORITATE et VOLUNTATE tradentis, uterque tenetur hoc judicio, unus propter factum, et alius propter auctoritatem. Si autem sine VOLUNTATE, tunc tenetur ejector utrique, tam domino proprietatis, quam firmario: firmario per istud breve, domino proprietatis per assisam novæ disseysinæ, ut unus rehabeat terminum cum damnis, et alius liberum tenementum suum sine damnis.*" But the difficulty is removed by the next sentence, in which he says, "*Si autem dominus proprietatis tenementum ad firmam traditum alicui dederit in dominico tenendum,*

(*a*) Bracton, b. 4. f. 220.

(*b*) Reeves, Eng. Law, Vol. I. p. 341.

seysinam ei facere poterit SALVO FIRMARIO TERMINO SUO." And it seems therefore, that in the latter clause of the passage first above cited, particularly from the omission of the word *autoritate* in it, Bracton only alluded to cases where the grantor had enfeoffed another, without intending thereby to injure his grantee, and such feoffee afterwards entered upon him. This interpretation is also most consistent with the spirit of the times in which Bracton wrote. It was then held that a man could not enter *vi et armis* into his own freehold, and the writ of *quare ejecit infra terminum* is not a writ of trespass *vi et armis*, which, if it had lain against those not having a title to the freehold, it naturally would have been. The old authorities (a) also, when describing the nature and effect of this writ, invariably speak of it as lying in those cases only where the ejector claims title under the grantor. A sale of the lands to the ejector is also stated in the body of the writ. And indeed, if the interpretation here contended for be incorrect, it seems quite unaccountable, that, more than half a century after the time of Bracton, a new writ, namely, the writ of *ejectione firmæ*, which only gave the plaintiff damages, and did not restore the term, should have been invented for lessees against strangers, when one so much more beneficial was already in existence.

(a) Thus, in Hil. Term, 3 Edward I. "In *quare ejecit* plaintiff shall recover his term and damages by him sustained by reason of the sale." (Stat. Ab. tit. *qua. ejec.*) In the Reg. Brev. (p. 227.) "*Fuit hoc breve inventum per discretum virum Wilhelmum de Merton ut terminarius recuperet catalla sua versus FEOFFATUM.*" In a case in Hil. Term, 46 Edw. III. 4. 12. per Fulthorpe, Justice, "If a stranger oust a lessee by reason of a *feoffment*, in that case he is put to his action upon the writ of *quare ejecit*;" and in the same case, per Finchden, J. "In such case, at the common law the lessee had no other

writ but his writ of covenant; and although by the law a special writ of *quare ejecit* is ordered against a stranger, a *feoffee*, nevertheless the lessee is not ousted of his writ of covenant against the lessor." This latter doctrine is exactly that laid down in Bracton. So also per Choke, J. (21 Edw. IV. 10. 30.) *Quare ejecit*, &c. lieth where one is in by title, *ejectione firmæ* where one is *by wrong*;" and *per totam curiam* (19 Henry VI. 59. 19.), "If a man lease for years, and sell to F. who ousts the termor, the lessee shall have a *quare ejecit*, and recover his term and damages."

The writ of *quare ejecit* might be drawn either as a *præcipe*, or a *si te fecerit securum*, and, when first invented, the *præcipe* was thought the better mode of proceeding, though in process of time, the latter became more generally used. It is, perhaps, from this circumstance, that Fitzherbert (*a*) has considered the invention of the writ to be posterior to the statute of Westminster the second (*b*).

The plaintiff by this writ, as by the old writ of covenant, recovered both his term and damages, if the term were unexpired, or his damages only in case of its expiration before the judgment; but the great advantage he derived from it, was the power of proceeding against third persons, as well as against the original grantor.

Notwithstanding this favourable alteration, the farmer was still without remedy when dispossessed by a mere stranger not claiming under his grantor. But an ouster by a stranger could then rarely happen; and if at any time the vassal was so dispossessed, he would throw himself on the protection of his lessor, abandon his own claim, and leave the lord to recover, by a real action, both the freehold and possession.

In process of time, however, the vassal demanded a remedy

(*a*) The inaccuracy of Fitzherbert, when speaking of this writ, is remarkable. He considers its invention as posterior to the statute of Westminster 2, (13 Edw. I.), and as intended to remedy a partial evil, occasioned by the writ of *ejectione firmæ*. (F. N. B. 458.) Bracton, however, who wrote in the reign of Henry III., speaks of the writ as in use in his time, and as having been invented to remedy the inconveniences attendant on the old writ of covenant. In the Reg. Brev. (227,) also, the same

reasons are given for its origin. The inaccuracy is evident also from another circumstance. WALTER DE MERTON, called by Fitzherbert *William de Moreton*, and in the Reg. Brev. *William de Merton*, (the inventor of the writ), was Chancellor in the reign of Henry III. (Dugdale's Chron.), and died in the sixth year of Edward I. (Matt. Westmon. p. 366.), seven years before the statute of Westminster 2 was enacted.

(*b*) F. N. B. 458.

for himself, and in the reign of King Edward II. or in the early part of that of Edward III. (a) a writ was invented, which gave a lessee for years a remedy (though in some respects an imperfect one) against all persons whatsoever, who ousted him of his term: excepting indeed where the grantor himself ejected his lessee, and subsequently enfeoffed another, in which case the old writ of *quare ejecit* was resorted to.

This new writ was a writ of trespass in its nature. The process upon it, as upon all other writs of trespass, was by attachment, distress, and process of outlawry. It called upon the defendant to show, wherefore, with force and arms, he entered upon certain lands which had been demised to the plaintiff for a term then unexpired, and ejected him from the possession thereof; and comprised all cases, within the single exception already mentioned, in which the second lessee, coming into possession by means of a title, could not be said to be a trespasser. Even the grantor was liable to be sued upon this new writ, notwithstanding the old doctrine, that a man could not enter *vi et armis* into his own freehold (b). As, however, the plaintiff did not possess a freehold interest, his title to the lands was only so far acknowledged in this action, as to give him damages for the injury he had sustained, but not to restore to him the possession of his term.

It is upon this writ, though apparently so dissimilar from the present practice, that the modern remedy by ejectment is founded.

Whilst the feudal system continued in its vigour, and estates for years retained their original character, but little inconvenience resulted to tenants from this imperfect remedy. But when the feudal policy declined, and agriculture became an

(a) The first recorded instance of an action of *ejectione firmæ*, is in the 44th year of Edward III. (Trin. 44 Edw. III. 22. 26).

(b) F. N. B. 505.

object of legislative regard, the value and importance of estates of this nature considerably increased, and it was necessary to afford to lessees for years a more effectual protection. It then became the practice for leaseholders, when disturbed in their possessions, to apply to Courts of Equity for redress, and to prosecute suits against the lessor himself, to obtain a specific performance of the grant, or against strangers for perpetual injunctions to quiet the possession; and these Courts would then compel a restitution of the land itself to the party immediately injured (*a*).

The Courts of common law soon afterwards adopted this method of rendering substantial justice; not indeed by the invention of a new writ, which perhaps would have been the best and most prudent method, but by adapting the one already in existence to the circumstances of the times; and introducing, in the prosecution of a writ of ejectment, a species of remedy neither warranted by the original writ, nor demanded by the declaration, namely, a judgment to recover the term, and a writ of possession thereupon.

It is singular, that neither the causes which led to this important change, nor the principles upon which it was founded, are recorded in any of the legal authorities of those times, it is difficult, if not impossible, to ascertain with accuracy, the precise period when the alteration itself took place; although it certainly must have been made between the years 1455 and 1499, since in the former year it is said by one of the Judges (*b*), that damages only can be recovered in ejectment; and an entry of a judgment is still extant, given in the latter of those years, that the plaintiff in ejectment shall recover both his damages and his term (*c*). It is said, indeed, in argument as early as the year 1458, that the term may be

(*a*) Gilb. Eject. p. 2.

VI. 42. 19.

(*b*) Per Choke, J., Mich. 33 Hen.

(*c*) Rast. Ent. 253 (*a*).

recovered in ejectment, but no reason is assigned for the assertion, nor is any decision upon the point on record until the time of the entry already mentioned (a).

But, whatever might be the cause which occasioned this alteration, the effects they produced were highly important. A new efficacy was given to the action of ejectment, the old real actions fell into disuse, and the action of ejectment became gradually the regular mode of proceeding for the trial of possessory titles.

That an action of ejectment, by means of this alteration in its judgment, might restore termors to possession who had been actually ejected from their lands, is sufficiently obvious; but it is not perhaps so evident how the same proceedings could be applicable to a disputed title of freehold, or why, as soon after happened, the freeholder should have adopted this novel remedy. No report of the case, in which this bold experiment was first made, is extant; but from the innumerable difficulties which attend real actions, it is not surprising that the freeholders should take advantage of any fiction which enabled him to avoid them; and as the Court of Common Pleas possessed an exclusive right of judicature in matters of real property, it is probable that the experiment originated in the Court of King's Bench, as an indirect method of giving to that Court a concurrent jurisdiction with the Common Pleas. But however this may be, the experiment succeeded, and the uses of the action, as well as its nature, were changed.

When first the remedy was applied to the trial of disputed titles, the proceedings were simple and regular, differing but little from those previously in use, when an ejectment was

(a) Brooke's Ab. tit. *Quare ejecit*, Ebrington, 1 Ad. & Ell. 756, note folio 167. Vide *Doe d. Poole v.* (a).

brought to recover the damages of an actual trespass. The right to the freehold could only be determined in an indirect manner. It was a term which was to be recovered by the judgment in the action, and it was therefore necessary that a term should be created; and as the injury complained of in the writ was the loss of the possession, it was also necessary that the person to whom the term was given, should be ejected from the lands.

In order to obtain the first of these requisites, namely, a term, the party claiming title entered upon the disputed premises, accompanied by another person, to whom, whilst on the lands, he sealed and delivered a lease for years. This actual entry was absolutely necessary; for, according to the old law of maintenance, it was a penal offence to convey a title to another, when the grantor himself was not in possession. And, indeed, it was at first doubted, whether this nominal possession, taken only for the purpose of trying the title, was sufficient to excuse him from the penalties of that offence (*a*).

It is from the necessity of this entry, that the remedy by ejectment is confined to cases in which the claimant has a possessory title, that is to say, a right of entry upon the lands. Whenever by reason of the intervention of any of the ancient rules regarding real property, as by descent cast, discontinuance, or warranty, the possessory right was turned into a right of action, the right of entry ceasing therewith, the entry of the claimant of course became illegal, and consequently not sufficient to enable him to convey a title to his lessee, the nominal plaintiff in the action; and as the principles of the action have remained unchanged, although the character of its proceedings have been altered, the right to make an entry has continued to be requisite, although, the entry itself has ceased to be necessary. This defect in the remedy has been recently

(*a*) 1 Ch. Rep. Append. 39.

provided against by the stat. 3 & 4 Wm. 4, c. 27, s. 39, which by enacting that no descent cast, discontinuance, or warranty, shall hereafter defeat any right of entry or action for the recovery of any land, has converted all titles into possessory titles, and thus made the remedy by ejectment of universal application.

The lessee of the claimant, having acquired a right to the possession, by means of the lease already mentioned, remained upon the land, and then the person who came next upon the freehold, *animo possidendi*, or, according to the old authorities, even by chance (*a*), was accounted an ejector of the lessee, and a trespasser on his possession. A writ of trespass and ejectment was then served upon the ejector by the lessee. The cause regularly proceeded to trial as in the common action of trespass: and as the lessee's claim could only be founded upon the title of his lessor, it was necessary to prove the lessor's interest in the land, to enable the plaintiff (the lessee) to obtain a verdict. The claimant's title was thus indirectly determined; and although the writ of possession must of course have been issued in the plaintiff's name, and not in his own, yet as the plaintiff had prosecuted the suit only as the lessor's friend he would immediately give up to him the possession of the lands.

In the infancy of the experiment, this mode of proceeding could be attended with no ill consequences. As the party previously in possession, must in contemplation of the law be upon the lands, and certainly, *animo possidendi*, the friend of the claimant was allowed to consider him as an ejector, and make him the defendant in the action. When, however, the remedy became more generally used, this simple method was found to be productive of considerable evil. It was easy for the claimant to conceal the proceedings from the person in possession, and to procure a second friend to enter upon the lands, and eject his lessee immediately after the execution and delivery of the lease. The lessee would then commence his

(a) 1 Lil. Prac. Reg. 673.

suit against this ejector, and the party in possession might consequently be ousted of his lands, without any opportunity of defending his title. To check this evil, a rule of Court was made, forbidding a plaintiff in ejectment to proceed against such third person, without giving a previous notice of the proceedings to the party in possession; and it was the practice for such party, on the receipt of this notice, if he had any title to the lands, to apply to the Court for permission to defend the action; which application was uniformly granted, upon his undertaking to indemnify the defendant (the third person) from the expenses of the suit. The action however proceeded in the name of such defendant, though the person in possession was permitted at the trial to give evidence of his own title.

A considerable alteration in the manner of proceeding in the action was occasioned by this rule, although it was only intended to remedy a particular evil. It became the general practice to have the lessee ejected by some third person, since called the casual ejector, and to give the regular notice to the person in possession, instead of making him, as before, the trespasser and defendant. A reasonable time was allowed by the Courts, for the person in possession, after the receipt of the notice, to make his application for leave to defend the action, and if he neglected to do so, the suit proceeded against the casual ejector, as if no notice had been necessary.

The time when this rule was made is unknown, but as the evil it was intended to remove must soon have been discovered, it probably was adopted shortly after the remedy grew into general use (*a*). It seems also to have been the first instance, in which the Courts interfered in the practice of the action, and is therefore remarkable as the foundation of the fictitious system, by which it is now conducted.

(*a*) *Fairclaim d. Fowler v. Shamtitle*, Burr. 1290—1297.

In this state, with the exception of a few practical regulations, not necessary to be here noticed, the action of ejectment continued until the time of the Commonwealth. Much trouble and inconvenience, however, attended the observance of the different formalities. If several persons were in possession of the disputed lands, it was necessary to execute separate leases upon the premises of the different tenants, and to commence separate actions upon the several leases (*a*). Difficulties also attended the making of entries, and the action of ejectment had by this time grown into such general use, as to make these inconveniences sensibly felt. A remedy, however, was discovered for them by Lord Chief Justice Rolle, who presided in the Court of Upper Bench during the Protectorate ; and a method of proceeding in ejectment was invented by him, which at once superseded the ancient practice, and has by degrees become fully adapted to the modern uses of the action (*b*).

By the new system, all the forms which we have been describing are dispensed with. No lease is sealed, no entry or ouster really made, the plaintiff and defendant in the suit are merely fictitious names, and in fact all those preliminaries are now only feigned, which the ancient practice required to be actually complied with.

An inquiry into the numerous regulations which have been made for the improvement of the modern practice, must be reserved for a future part of this work ; but it may be useful to give in this place a brief outline of the system, although a detailed account will be hereafter necessary.

A. the person claiming title, delivers to *B.* the person in possession, a declaration in ejectment, in which *C.* and *D.*, two fictitious persons, are made respectively plaintiff and de-

(*a*) Co. Litt. 252. *Argoll v. Cheney*, Palm. 402.

(*b*) Styles, *Prac. Reg.* 108. (ed. 1657).

fendant; and in which *C.* states a fictitious demise of the lands in question from *A.* to himself for a term of years, and complains of an ouster from them by *D.* during its continuance. To this declaration is annexed a notice, supposed to be written and signed by *D.*, informing *B.* of the proceedings, and advising him to apply to the Court for permission to be made defendant in his place, as he, having no title, shall leave the suit undefended. Upon the receipt of this declaration, if *B.* do not apply within a limited time to be made defendant, he is supposed to have no title to the premises; and upon an affidavit that a declaration has been regularly served upon him, the Court will order judgment to be entered against *D.* the casual ejector, and possession of the lands will be given to *A.* the party claiming title. When, however, *B.* applies, pursuant to the notice, to defend the action, the Courts annex certain conditions to the privilege. Four things are necessary to enable a person to support an ejectment, namely, title, lease, entry, and ouster; and as the three latter are only feigned in the modern practice, *C.* (the plaintiff) would be nonsuited at the trial if he were obliged to prove them. The Courts therefore compel *B.*, if made defendant, to enter into a rule, generally termed *the consent-rule*, by which he undertakes, that at the trial he will confess the lease, entry, and ouster to have been regularly made, and rely solely upon the merits of his title; and, lest at the trial he should break this engagement, another condition is also added, that in such case, he shall pay the costs of the suit, and shall allow judgment to be entered against *D.* the casual ejector. These conditions being complied with, the declaration is altered, by making *B.* the defendant instead of *D.*, and the cause proceeds to trial in the same manner as in other actions.

The advantages resulting from this method are obvious: the claimant is exempted from the observance of useless forms, and the tenant admits nothing which can prejudice the merits of the case.

It could not indeed be expected that a change so extensive should, in the first instance, be entirely free from defects nor that it would not, like other innovations, occasion some inconvenience when first introduced. For a few years after its invention, the Courts seem occasionally to have been confused between the ancient and modern systems, and not to have established, so distinctly as might have been desired, the principles which were to regulate the proceedings they had so newly adopted. The action has, however, now attained a considerable degree of perfection. Its principles are clearly understood, and its practice is reduced to a regular and settled system. The Legislature has frequently interfered to correct its deficiencies. The Courts continue to regard it with great liberality; and the remedy by ejectment has now become a most useful legal proceeding, unembarrassed by the difficulties formerly attendant upon real actions, and well adapted to the purposes of substantial justice.

CHAPTER II.

Of what things an Ejectment will lie, and how they are to be described.

By the common law, an ejectment will not lie for any thing, whereon an entry cannot be made, or of which the sheriff cannot deliver possession; or, in other words, it is only maintainable for corporeal hereditaments. Thus an ejectment will not lie for a rent, an advowson, a common in gross, or *pur cause de vicinage*, or any other thing which passes only by grant. Tithes, indeed, though an incorporeal inheritance, may be recovered by this action, but the right of maintaining an ejectment for them, does not arise from the common law, but is given by the provisions of the statute 32 Hen. VIII. c. 7.

An ejectment will not lie for lands belonging to the Crown, of which the Crown is in possession by its officer, the proper remedy is by petition of right (*a*).

It was formerly holden that an ejectment did not lie for a church or chapel, though corporeal hereditaments, because they were *res sacræ*, and therefore not demisable; but this doctrine is now exploded, though in point of form they should still be demanded as *messuages* (*b*).

But an ejectment will not lie for a canonry, for a canonry is "an ecclesiastical office, only capable of being held by a person in priest's orders," and such spiritual right cannot be

(*a*) Doe d. Legh v. Roe, 8 M. & W. 579. Thyn v. Thyn, Styles, 101; Doc. Plac. 291; Hillingsworth v. Brew-

(*b*) Harpur's case, 11 Co. 25, (*b*) ster, Salk. 256.

delivered under a writ of possession, and for the like reason ejectment will not lie for a prebendal stall (*a*).

A common appendant or appurtenant may be recovered in an ejectment, brought for the lands to which it is appendant or appurtenant, provided such right of common be mentioned in the description of the premises; because he who has possession of the land has also possession of the common; and the sheriff by giving possession of the one, executes the writ as to the other. But it may be prudent to state in the description, that the common so claimed is a common appendant or appurtenant, although it has been held after verdict, that an ejectment for lands and also for "common of pasture," generally, is sufficient (*b*).

An ejectment will also lie for a boilary of salt, although by the grant of a boilary of salt the grantee is only entitled to a certain proportion of the number of buckets of salt water drawn out of a particular salt-water well; for by the grant of a boilary of salt the soil shall pass, inasmuch as it is the whole profit of the soil (*c*).

Upon the same principle an ejectment may be maintained for a coal mine, for it is not to be considered as a bare profit *apprender*, but as comprehending the ground or soil itself, which may be delivered in execution; and though a man may have a right to the mine without any title to the soil, yet the mine being fixed in a certain place, the sheriff has a thing certain before him of which he can deliver possession (*d*).

But an ejectment will not lie for a *tin bound*, which is a mere

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| (<i>a</i>) Doe d. Butcher v. Musgrave,
1 Man. & G. 625, <i>et vide</i> , Rex v.
the Bishop of London, 1 Wils. 11,
14. | myfast, Stran. 54. |
| (<i>b</i>) Baker v. Roe, Cas. Temp.
Hard. 127; Newman v. Hold- | (<i>c</i>) Smith v. Barrett, Sid. 161;
S. C. 1 Lev. 114, Co. Litt. 4, (<i>b</i>).
(<i>d</i>) Comyn v. Kineto, Cro. Jac.
150; Comyn v. Wheatley, Noy.
121. |

easement, being nothing more than the liberty of entering and marking out certain bounds, within which the party has acquired a right to work a tin mine (*a*).

When a grant of mines is so worded as not to operate as an actual demise, but only as a license to dig search for and take metals and minerals within a certain district during the term granted: it seems that a party claiming under such a grant, and who shall open and work and be in actual possession of any mines, may if ousted maintain ejectment in respect of them; but he cannot maintain ejectment either in respect of mines within the district, which he has not opened, or which, having opened, he has abandoned (*b*).

An ejectment cannot be maintained against a person for setting up a stall in a public street, even assuming the freehold to belong to the parish (*c*).

In the old cases it is holden, that an ejectment will not lie for a fishery because it is only a profit *apprender* (*d*); but it is said by Ashhurst, J., in the case of *The King v. the Inhabitants of Old Arlesford* (*e*), "There is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment."

But an ejectment will not lie for a watercourse or rivulet, though its name be mentioned, because it is impossible to give execution of a thing which is transient, and always running. But if the ground over which the rivulet runs, belongs to the claimant, the rivulet may be recovered, by laying the action for "so many acres of land covered with

(*a*) *Doe d. Earl of Falmouth v. Alderson*, 1 M. & W. 210.

(*b*) *Doe d. Hanley v. Wood*, 2 B. & A. 724; *Crocker v. Fothergill*, 2 B. & A. 652.

(*c*) *Doe d. Overseers of Poor,*

&c. *v. Cowley*, 1 C. & P. 123.

(*d*) *Molineaux v. Molineaux*, Cro. Jac. 144; *Herbert v. Laughlen*, Cro. Car. 492; *Waddy v. Newton*, 8 Mod. 275, 277.

(*e*) 1 T. R. 358.

water" (a). An ejectment may be maintained for a pool, or pit of water, because those words comprehend both land and water (b).

The owner of the soil may maintain an ejectment for land, which is part of the king's highway; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner. But he must recover the land, and the sheriff give possession of it, subject to the public easement (c).

An ejectment will lie *pro prima tonsura*: that is to say, if a man has a grant of the first grass which grows on the land every year, he may maintain ejectment against him who withholds it from him (d). So also a demise of the hay-grass and after-math is sufficient to support an ejectment (e). And the principle seems to be this, that the parties in these cases, being entitled to all the profits of the land, for the time being, are entitled also for the same time to the land itself; and no man can enter thereon whilst they are so entitled, without being a trespasser. But the ejectment should not be brought for the land generally, but for the first grass or after-math thereof, as the case may be; although where the demise was for so many acres of pasture land, it was held sufficient for the lessor of the plaintiff to show that he was entitled to the *prima tonsura* thereof, because the first grass being the most signal profit, the freehold of the land shall be esteemed to be in him who has it, until the contrary is shown (f).

A right to the herbage will also be sufficient to support an

(a) Challenor v. Thomas, Yelv. 362.
143.

(b) Ibid. Co. Litt. 5, (b).

(c) Goodtitle d. Chester v. Alker,
Bur. 133, 145.

(d) Ward v. Petifer, Cro. Car.

(e) Wheeler v. Toulson, Hard.

330.

(f) Rex v. Inhabitants of Stoke,
2 T. R. 451.

ejectment, because he who has a grant of the herbage has a particular interest in the soil, although by such grant the soil itself does not pass. But the ejectment should be for the herbage of the land, and not for the land itself (*a*).

In like manner an ejectment will lie for the pasture of a hundred sheep (*b*).

But a right to the pannage is not enough, because pannage is only the mast which falls from the trees, and not part of the soil itself (*c*).

An ejectment will not lie for dower before assignment (*d*).

With respect to the manner in which the premises should be described in an ejectment, no determinate rule exists: nor is it easy to discover from the adjudged cases, any principle which can guide us on the subject. It is very frequently said in general terms, that the description shall be *sufficiently certain*; but the degree of certainty required, particularly in the more ancient cases, seems to depend upon caprice rather than principle. In the earlier stages of the remedy, when ejectments were compared to real actions, and arguments were drawn from analogy with them, a practice which obtained until after the reign of James I., much greater certainty was required than is now necessary: and it appears, that when the action was first invented, as much certainly was requisite as in a *præcipe quod reddat* (*e*). The Courts, indeed, soon relaxed this severity, and allowed many descriptions to be sufficient in an ejectment, which would have been held too uncertain in a *præcipe*; as, for instance, an ejectment for a hopyard was

(*a*) *Wheeler v. Toulson*. Hard. 330.

(*b*) *Anon.* 2 Dal. 95.

(*c*) *Pemble v. Sterne*, 1 Lev. 212, 3; S. C. 1 Sid. 416.

(*d*) *Doe d. Nutt v. Nutt*, 2 Car. & P. 430.

(*e*) *Macdunoch v. Stafford*, 2 Roll. Rep. 166.

held good; so also for an orchard, though in a *præcipe* it should be demanded as a garden (*a*); yet notwithstanding this alteration, it was considered an established principle, until within the last century, that the description must be so certain as to enable the sheriff exactly to know, without any information from the lessor of the plaintiff, of what to deliver possession (*b*). Amongst other salutary regulations, however, which the wisdom of modern times has introduced into this action, the abolition of this maxim may be reckoned: and it is now the practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril (*c*).

Few cases are to be found in the modern books, wherein points respecting the certainty of description have arisen; and the authority of the old cases is very doubtful. The degree of certainty formerly required was much greater than is now necessary, and it is not improbable that many of the old decisions would be overruled, should they again come under the consideration of the Courts (*d*).

Lands will be sufficiently described by the provincial terms of the counties in which they lie. Thus an ejectment may be maintained for "five acres of alder carr" in Norfolk:—alder carr in that county signifying land covered with alders. So also in Suffolk, for a beast gate; and in Yorkshire, for cattle gates (*e*).

The same principle applies to ejectments in Ireland; and

(*a*) *Wright v. Wheatley*, Noy. 623, 630; *Connor v. West*, Burr. 37; S. C. Cro. Eliz. 854; *Royston v. Eccleston*, Cro. Jac. 654; S. C. Palm. 337.

(*b*) *Bindover v. Sindercome*, 2 Raym. 1470, and the cases there cited.

(*c*) *Cottingham v. King*, Burr.

623, 630; *Connor v. West*, Burr. 2672.

(*d*) *St. John v. Comyn*, Yelv. 117; *Cottingham v. King*, Burr. 623.

(*e*) *Barnes v. Peterson*, Stran. 1063; *Bennington v. Goodtitle*, ib. 1084.

terms used in that country will be sufficiently certain, when writs of error are brought therefrom in this kingdom. Thus an ejectment will lie in Ireland, for a township, for a kneave (*a*) or quarter of land, or for so many acres of bog or of mountain (*b*): the word mountain being in that kingdom rather a description of the quality, than the situation of land (*c*).

But an ejectment in England for a hundred acres of mountain, or a hundred acres of waste, has been held to be bad for uncertainty, because both waste and mountain comprehend in England many sorts of land (*d*).

It is no objection to a description that the premises are twice demanded in the same demise (*e*).

An ejectment will not lie for a tenement, because many incorporeal hereditaments are included in that appellation (*f*), and therefore the description is not certain enough; nor will an ejectment lie for a messuage, *or* tenement, for the signification of the word tenement being more extensive than that of the word messuage, it is not sufficiently certain what is intended to be demanded in the ejectment (*g*). It is also holden that an ejectment will not lie for a messuage *and* tenement (*h*).

(*a*) Cottingham *v.* King, Burr. 623, 30.

(*b*) Barnes *v.* Peterson. Stran. 1093; Bennington *v.* Goodtitle, ib. 1084.

(*c*) Kildare *v.* Fisher, Stran. 71, *vide cont.*; Macdonnogh *v.* Stafford, Palm. 100; S. C. 2 Roll. Rep. 189; St. John *v.* Comyn, Yelv. 117.

(*d*) Hancock *v.* Price, Hard. 57.

(*e*) Warren *v.* Wakeley, 2 Roll. Rep. 482.

(*f*) Goodtitle *v.* Walton, Stran. 834; Copleston *v.* Piper, Ld. Raym. 191.

(*g*) Ashworth *v.* Stanley, Styl. 364; Wood *v.* Payne, Cro. Eliz. 186; Rochester *v.* Rickhouse. Pop. 203.

(*h*) Doe d. Bradshaw *v.* Plowman, 1 East, 441, and the cases there cited.—In the case of Goodright d. Welch *v.* Flood, (3 Wils. 23), in which a motion was made to arrest the judgment, because the

But an ejectment for a messuage *or* tenement, with other words expressing its meaning, is good, as a messuage or tenement called *the Black Swan*; for the addition reduces it to the certainty of a dwelling-house (*a*).

So also an ejectment for a messuage or burgage is good; because both signify the same thing in a borough (*b*).

An ejectment for four corn-mills, without saying of what kind, whether wind-mills or water-mills, is good; for the precedents in the register are so (*c*).

plaintiff had declared of a messuage *or* tenement, the Court endeavoured to get over the objection, and took time for consideration, but ultimately thought themselves bound by the adjudged cases, and reluctantly arrested the judgment. Afterwards, in *Doe d. Stewart v. Denton*, (1 T. R. 11), on a similar application, where the plaintiff had declared for a messuage *and* tenement, the Court refused to grant the rule, Buller, J. saying, he remembered a case where a messuage *or* tenement had been held sufficiently certain. But this case was afterwards overruled, in *Doe d. Bradshaw v. Plowman*, (1 East, 441), "for that it passed by surprise, and was not law, being contrary to adjudged cases." The point is therefore now at rest, although from the cases of *Goodtitle d. Wright v. Otway*, (3 East, 357), and *Doe d. Laurie v. Dyball*, (1 M. & P. 330, and 8 B. & C. 70), the defendant is precluded from deriving any advantage from such error in description. In the former case, the plaintiff had declared for a messuage *and* tenement, and the verdict was entered generally; but the Court permitted the lessor (pending

a rule *nisi* to arrest the judgment for the uncertainty) to enter the verdict according to the Judge's notes for the messuage *only*, and that without releasing the damages. In the latter case, the declaration was for twenty messuages, twenty tenements, &c.; and the judgment being entered generally for the plaintiff, the defendant brought a writ of error in the King's Bench, pending which writ the Court of Common Pleas allowed the record to be amended, by striking out the words "twenty tenements;" and the Court of King's Bench in the following Term, (the record I presume not having been amended) gave judgment for the defendant in error on this ground, that if the same count contains two demands or complaints, for one of which only an action lies, all the damages shall be referred to the good cause of action, although *secus* if in separate counts.

(*a*) *Burbury v. Yeomans*, 1 Sid. 295.

(*b*) *Danvers v. Wellington*, Hard. 173; *Rochester v. Rickhouse*, Pop. 203.

(*c*) *Fitzgerald v. Marshal*, 1 Mod. 90.

An ejectment will lie for a stable and cottage (*a*), and also for a house; though in a *præcipe* it ought to be demanded by the name of a messuage (*b*).

Ejectment of a place called a passage room is certain enough (*c*). So also of a room, and of a chamber in the second story (*d*). In like manner it has been held that an ejectment for "part of a house in *A*." is sufficiently certain (*e*). So also of "a certain place called the vestry" (*f*).

It has formerly been holden that an ejectment for a kitchen could not be supported; because, although the word be well enough understood in common parlance, yet, as any chamber in a house may be applied to that use, the sheriff has not certainty enough to direct him in the execution, and the kitchen may be changed between judgment and execution; but this reasoning does not correspond with the maxims of the present day (*g*).

An ejectment will not lie for a close (*h*), nor for the third, or other part of a close, nor for a piece of land, unless the particular contents or number of acres be specified (*i*). From the old authorities, it seems also formerly to have been holden, (though the point is certainly somewhat obscure), that the addition of the name of the close, without mention of the

(*a*) *Hill v. Giles*, Cro. Eliz. 818; 95.
Lady Dacres' case, 1 Lev. 58;
Hammond v. Ireland, Sty. 215.

(*b*) *Royston v. Eccleston*, Cro. Jac. 654; S. C. Palm. 337.

(*c*) *Bindover v. Sindercombe*, Ld. Raym. 1470.

(*d*) *Anon.* 3 Leon. 210.

(*e*) *Sullivan v. Seagrave*, Stran. 695; *Rawson v. Maynard*, Cro. Eliz. 286,

(*f*) *Hutchinson v. Puller*, 3 Lev.

(*g*) *Ford v. Lerke*, Noy. 109.

(*h*) *Savel's case*, 11 Co. 55 *Hammond v. Savel*, 1 Rol. Rep. 55; *Knight v. Syms*, Salk. 254; *Joans v. Hoel*, Cro. Eliz. 235.

(*i*) *Palmer's case*, Owen, 18; *Martyn v. Nichols*, Cro. Car. 573; *Jordan v. Cleabourne*, Cro. Eliz. 339; *Pemble v. Sterne*, 1 Lev. 213.

number of acres, would be bad; though such a description, it is conceived, would now be deemed sufficiently certain (*a*).

In ejectment for land, the particular species should be mentioned in the description, whether *pasture*, *meadow*, &c. because land, in its legal acceptation, signifies only *arable* land (*b*).

An ejectment for ten acres of underwood has been held good (*c*); because underwood is so well understood in law, that the sheriff has certainty enough to direct him in the execution.

“Fifty acres of gorse and furze” (*d*) has been held sufficiently certain in an ejectment, without specifying the particular quantity of each: so also “fifty acres of furze and heath,” and “fifty acres of moor and marsh” (*e*).

An ejectment for “ten acres of pease” has been held to be certain enough, as signifying the same with ten acres of land covered with pease (*f*).

It seems that an ejectment may be brought for a manor, or a moiety of a manor, generally, without any description of the number of acres, or species of land contained therein, and that under such general description the jury may find the verdict for the plaintiff, for a messuage, or for so many acres “parcel of the said manor,” and for the defendant, for the residue of the

(*a*) Lady Dacres' case, 1 Lev. 58; Savel's case, 11 Co. 55; Knight v. Syms, 1 Salk. 254; Royston v. Eccleston, Cro. Jac. 654; Jordan v. Cleabourne, Cro. Eliz. 339; Wykes v. Sparrow, Cro. Jac. 435.

(*b*) Massey v. Rice, Cowp. 346, 349; Savel's case, 11 Co. 55.

(*c*) Warren v. Wakeley, 2 Roll. Rep. 482.

(*d*) Fitzgerald v. Marshall, 1 Mod. 90.

(*e*) Connor v. West, Burr. 2672.

(*f*) Odingsall v. Jackson, 1 Brown, 149.

manor; but it is said in the old cases, not to be safe to bring an ejectment for a manor without describing the quantity and species of the land (*a*).

When an ejectment is brought for tithes, (*b*) the particular species of tithe demanded should be specified in the declaration as of hay, wheat, &c., or the description will be bad for uncertainty; (*c*) but it is not also necessary to mention the precise quantity of each species, because tithe is in its nature uncertain, the quantity entirely depending on the fruitfulness of the season, and it is therefore enough to say, "of certain tithes of hay, wool, &c." (*d*).

In an old case, where the plaintiff declared on a lease for tithes in *R.* belonging to the rectory of *D.*, and that the defendant entered upon him, and took *such* tithes severed from the nine parts in *R.*, without saying that the tithes so taken belonged to the rectory of *D.*, the description was held ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in *R.*, which did not belong to the rectory of *D.* (*e*)

In an ejectment brought in the county of *Durham*, the plaintiff declared "for coal-mines in *Gateside*" generally, not specifying the particular number; and it appearing upon a

(*a*) Warden's case, Het. 146; Cole v. Aylott. Litt. Rep. 299, 301; Hems v. Stroud, Latch. 61.

(*b*) It was once contended, that in an ejectment for tithes, the ejectment should be laid, "of the rectory, or chapel, and of the tithes thereunto appertaining," for that the plaintiff could not have a writ of *habere facias possessionem* of the tithes only; but the objection was

overruled; Baldwin v. Wine, Cro. Car. 301.

(*c*) Harpur's case, 11 Co. 25 (*b*); Worrall v. Harper, 1 Roll. Rep. 65, 68; Dyer, 84, 5.

(*d*) Anon. Dyer, 116, (*b*).

(*e*) Baldwin v. Wine, W. Jones, 321, *tamen quære, et vide* Goodright d. Smallwood v. Strother, Blk. 706.

writ of error, that such was the customary mode of declaring in the county, the judgment for the plaintiff was affirmed (*a*).

If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named (*b*).

(*a*) *Whittingham v. Andrews*, 4 S. C. Comb. 201.
Mod. 143; S. C. 1 Show. 364; (*b*) *Goodtitle d. Chester v. Alker*,
S. C. Salk. 255; S. C. Carth. 277; Burr. 133, 144.

CHAPTER III.

Of the Title necessary to support the Action of Ejectment.

It is a maxim of our law that the party in possession of property is considered to be the owner, until the contrary is proved (*a*). It is necessary, therefore, for a claimant in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of the defendant's claim, for the possession of the latter gives him a right against every man who cannot establish a title; and if he can answer the case on the part of the claimant, by showing the real title to be in another, it will be sufficient for his defence, (excepting of course those cases in which the defendant is estopped from disputing the claimant's title) although he does not pretend that he holds the lands with the consent, or under the authority of the real owner (*b*).

The claimant must also be clothed with *the legal title* to the lands (*c*). No equitable title will avail. And this principle is so fixed and immutable, that a trustee may maintain ejectment against his own *cestui que trust* (*d*), and an unsatisfied term outstanding in trustees will bar the recovery of the heir-at-law, even though he claim only subject to the charge (*e*). In the time of Lord Mansfield, indeed, the Court of King's Bench adopted a different principle, and exercised a species of equitable jurisdiction in this action. Thus a mortgagee was

(*a*) Doe d. Hughes v. Dyball, 1 M. & M. 346. v. Wharton, 8 T. R. 2; Doe d. Blake v. Luxton, 6 T. R. 289.

(*b*) Roe d. Haldane v. Harvey, 4 Burr. 2484; Doe d. Crisp v. Barber, 2 T. R. 749. (*d*) Roe d. Reade v. Read, 8 I. R. 118, 123.

(*c*) Goodtitle d. Jones v. Jones, 7 T. R. 43, 47; Doe d. Da Costa v. (e) Doe d. Hodson v. Staple, 2 T. R. 684; Barnes v. Crow, 4 Bro. C. C. 2.

permitted to maintain ejectment against a tenant, claiming under a lease granted prior to the mortgage, provided he gave notice to the tenant that he did not intend to disturb the possession, but only to get into the receipt of the rents and profits of the estate; (a) the legal estate of a trustee was not allowed to be set up against the *cestui que trust*; (b) an *agreement* for a lease was held tantamount to a lease; (c) and a reversioner was allowed to recover his reversionary interest, subject to a lease and immediate right of possession in another (d). But these cases have long been overruled, and the clearness and certainty of the principle since adopted, amply compensate for the partial inconvenience it may at times occasion.

Formerly also, it was necessary, that the claimant should have what was termed a right of entry into, or possession of the land, as distinguished from a right of property or action therein, and much abstruse learning is extant in the old authorities as to the modes by which one of these species of titles might be converted into the other; but the ancient distinctions between these different rights having been abolished by stat. 3 & 4 Wm. IV. c. 27, and the stat. 21 Jac. I. c. 16, upon which the rights arising from adverse possession are founded, also in effect repealed by its provisions, it has become unnecessary to discuss the principles by which descents cast, disseisin, and warranty were governed, or to encumber this Treatise with unsatisfactory decisions upon the doctrine of adverse possession (e).

The stat. 3 & 4 Wm. IV. c. 27, justly entitled "an Act

(a) *Keech d. Warne v. Hall*, Wigfall *v. Brydon*, Burr. 1895, Doug. 21; *Moss v. Gallimore*, 1901. Doug. 279, B. N. P. 96.

(b) *Lade v. Holford*, B. N. P. 110; S. C. Burr. 1416; S. C. Blk. 428; *Doe d. Hodson v. Staple*, 2 T. R. 684; *Doe d. Gibbon v. Pott*, Doug. 710, 721, *et vide Oates d.* (c) *Weakley d. Yea v. Bucknell*, Cowp. 473.

(d) Per Buller, J. in *Doe d. Bristow v. Pegge*, 1 T. R. 759, (in notis).

(e) *Nepean v. Doe*, 2 M. & W. 894.

for the limitation of actions and suits relating to real property, and for simplifying, the remedies for trying the rights thereto," has introduced an entirely new principle into our remedial law. By that statute all titles to land are reduced to possessory titles, so that the right of recovery and the remedy by ejectment are made co-extensive, whilst the mere acquiescence of a claimant, or succession of claimants in the same right (being under no legal disabilities), in the possession of the land by a stranger, without enforcing his or their rights by legal proceedings for a period of twenty years, is an effectual bar to all claim against the party so possessed, and such possession undisturbed for forty years, gives to him an absolute indefeasable title to the property; notwithstanding there may have been a continued existence of legal disabilities in the rightful owners.

In order, therefore, to determine whether a party claiming lands can proceed to recover them by ejectment, it is necessary to consider, firstly whether the claim is consistent with the restrictive provisions of the stat. 3 & 4 Wm. IV. c. 27, and secondly, whether the title is a legal or an equitable one.

Firstly, as to the stat. 3 & 4 Wm. IV. c. 27.

It will be necessary to enter somewhat largely into the several provisions of this statute, and we shall herein consider; firstly, its general restrictive provisions, and secondly, the various periods from which they begin to run, in the several cases of remainder men, reversioners, issue in tail, personal representatives, mortgagees, ecclesiastical persons, and persons under legal disabilities: premising that in order to prevent needless repetition, the word "claimant" will be used to denote the "person claiming the land and the persons through whom he claims;" the word "rights," the "right to make an entry or bring an action to recover the land;" the word "estate;" "any estate or interest;" the words "future estate," any "estate or estates or interest in reversion or remainder, or any other future estate or interest;"

and the word "possession," "the possession or receipt of the rents or profits of the land, in respect of which the claim is made."

Firstly, as to the general restrictive provisions of the statute.

The second section provides, that after December 1, 1833, no person shall make an entry, or bring an action to recover any land, "but within twenty years next after the time at which the right to make such entry or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued through any person through whom he claims, then within twenty years next after the time at which the right to make such entry, or to bring such action shall have first accrued to the person making or bringing the same."

In the construction of this act, it is declared by section 3, that the right to make such entry or bring such action, is deemed to have first accrued according to the following rules, that is to say: where the claimant has, in respect of the estate claimed, been in possession, and while entitled thereto been dispossessed, or discontinued such possession, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any profits were received; and where the claimant shall claim the estate of some deceased person, who shall have continued in such possession until the time of his death, and shall have been the last person entitled to such estate who shall have been in such possession, then such right shall be deemed to have first accrued at the time of such death; and where the claimant shall claim in respect of an estate in possession, in any manner assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate in possession, and no person entitled under such instrument shall have been in

such possession, then such right shall be deemed to have first accrued at the time at which the claimant became entitled to such possession by virtue of such instruments; and where the estate claimed shall have been a future estate, and no person shall have obtained the possession in respect thereof, then such right shall be deemed to have first accrued at the time at which the same became an estate in possession; and where the claimant has become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition broken.

As to what shall be deemed possession within the meaning of the above clauses, it is enacted, by sections 10 & 11, that no person shall be deemed to have been so in possession merely by reason of having made an entry thereon, or continued claim thereof; and by section 35, the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease) be deemed to be the receipt of profit. And by section 14, where any acknowledgment of title shall be given to a party or his agent in writing, signed by the person in possession, then the possession of such person shall be deemed to be the possession of the party to whom or to whose agent such acknowledgment was given; and the right of such party, or those claiming through him, to recover such land, shall be deemed to have first accrued at and not before the time at which such acknowledgment was given.

Attornment in writing is of course a good admission of title within the meaning of this clause; and if it be merely an attornment, and do not amount to a new demise, it will not require a stamp (*a*). So where, in answer to an application for alleged arrears of rent, the tenant by letter complained of

(*a*) Doe d. Livsey v. Edwards, 5 Ad. & Ell. 95.

having been put to much expense with respect to the land, and said it was reasonable that the lords of the fee should make him recompence accordingly, and that *F.* (the party applying) should vindicate his right to the land rather than that the expenses should fall upon the tenants, and concluded his letter by begging "compassion, mercy, and pity, and recompence in a satisfactory manner," this was holden to be an admission of title within the meaning of this section (*a*). But where a party in adverse possession of land, being applied to by a person claiming title to it to pay rent, offering a lease of it, wrote thus, "Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years;" but the bargain went off, and no rent was paid or lease executed, this letter was holden not to amount to an admission of title within the meaning of this section (*b*).

Where *A.* was in possession of lands for more than twenty years, and died in possession, and his widow had possession from that time until her death, twenty years after, and *B.* was the eldest son both of *A.* and his wife, it was contended that *B.* could not recover, because as heir of his father, he had been kept out of possession by his mother above twenty years, and was therefore barred by the statute 3 & 4 Wm. 4, c. 27, and he could not claim as heir of his mother, because the mother's possession not being an adverse one, she could not acquire a descendible estate; *Coleridge, J.* directed the jury to infer that the property belonged to the mother, and survived to him on her husband's death, and then descended to *B.* as his heir, and the plaintiff had a verdict (*c*).

(*a*) *Fursdon v. Clegg*, 10 Mee. 6 Mee. & W. 295.
& W. 572.

(*b*) *Doe d. Curzon v. Edmonds*, & P. 773.

(*c*) *Doe d. Bennett v. Long*, 9 C.

Secondly, as to the time within which a remainderman or reversioner must claim.

By section 3, when the estate claimed is a future estate, and no person has obtained possession in respect thereof, then the right is deemed to have first accrued at the time at which such estate became an estate in possession. Where, therefore, a lessor allowed his tenant to remain in possession for more than twenty years without paying rent, he is not thereby deprived of his right; but may bring his action at any time within twenty years after his reversion becomes an "estate or interest in possession," that is to say, after the tenant's term has expired (*a*). Where the tenant for life has gone abroad, and not been afterwards heard of, the statute begins to run against the remainderman from the time the tenant for life goes abroad, (unless he is able to prove the exact period of his death), and not from the expiration of seven years (*b*).

By section 5, it is enacted, that the right to make an entry or bring an ejectment shall be deemed to have accrued in respect of any estate or interest in reversion at the time at which the same shall have become an estate or interest in possession by the determination of any estate, in respect of which the land shall have been held, or the profits received, notwithstanding the claimant should previously to the creation of the determined estate have been in possession or receipt of the profits.

But by section 20, when the right of any person entitled to an estate in possession shall have been barred by the determination of the period applicable by the statute to such case, and such person shall at any time during such period have been entitled to any other estate whatsoever in reversion, or

(*a*) *Doe d. Davey v. Oxenham*,
7 M. & W. 131.

(*b*) *Nepean v. Doe*, (in error),
2 M. & W. 894.

otherwise, to the same land, no entry or action shall be made or brought by such person, or any person claiming through him in respect of such other estate, unless in the mean time such land shall have been recovered by some person entitled to an estate, limited or having taken effect after or in defeazance of such estate in possession.

Where the rights of a remainderman, &c. arise after an estate tail, if the tenant in tail die seised, the remainderman must enter or bring his action within twenty years after the death. But by section 21, when the rights of a tenant in tail have been barred by reason of the same not having been enforced within the period applicable in such case, the bar after his decease will extend to every person claiming any estate which such tenant in tail might lawfully have barred. And by section 22, when a tenant in tail shall die before the expiration of the period applicable in such case, for making an entry, or bringing an action, no person claiming any estate which such tenant in tail might lawfully have barred, shall make an entry or bring an action, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or brought such action.

Where estates were settled to the use of *A. B.* for life, with remainder to her issue in tail, and remainders after, and in 1818, by proper assurances, to which *A. B.*, her husband and only child, *R. G.*, were parties, the estates were limited to the husband for life, remainder to the wife for life, remainder to *R. G.* for life, remainder to his issue in tail, remainder to *J. F.*, his sister, for life, with other remainders over; and the husband died in 1819, the wife in 1822, and *R. G.* in 1828, it was held that inasmuch as the estate of *J. F.* was carved out by the estate tail of *R. G.*, she had the same period for bringing the ejectment as he

would have had if he had continued alive, that is to say, twenty years from 1822, when his remainder came into possession (a).

With respect to the rights of a reversioner against a tenant at will, or from year to year, it is enacted by section 7, that when any person shall be in possession as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or bring an action, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. It is provided by the statute that no mortgagee or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause.

The trusts comprised within this proviso are only express and declared trusts, and a purchaser let into possession under an agreement to purchase is not a *cestui que trust* within its meaning but a tenant at will, and in case the agreement should not be completed, the vendor must bring his action within twenty years, or he will be barred (b). But where, in 1816, a person was then let into possession under an agreement to purchase, which was never completed, and continued in possession until his death in 1822, without paying rent; and then his widow, to whom he had devised all his real estate, entered and was possessed; and rent being demanded of her in 1827, she promised to pay it but never did: in ejectment brought in 1842, by the heir of the vendor, the Court held that it was rightly left to the jury to say, whether a tenancy at will had not been created between the vendor

(a) *Doe d. Curzon v. Edmonds*,
6 Mee. & W. 295.

(b) *Doe d. Counsell v. Caperton*,
9 Car. & P. 112.

and the widow, the action being otherwise barred by this section (a).

The rights conferred on tenants at will by this statute, do not extend to such tenants at will as shall have quitted possession before the statute was passed, so as to enable them to recover the land, on the ground that they had acquired a fee by the non-payment of rent for twenty years before they quitted possession (b).

Where a tenancy at will has been created between the lessor and the defendant, or those under whom he claims, and such tenancy has been determined, and a new tenancy at will created, the statute will run from the time of the creation of such second tenancy, and the determination of the original tenancy at will is a question for the jury. An entry on the land by the landlord without the tenant's consent, and cutting and carrying away stones therefrom, has been held on error to warrant a jury in finding the then existing tenancy at will thereby determined; and a subsequent assessment for the land tax in the parish by the defendant, being an assessor, in which he names himself as occupier, and his landlord as proprietor of the land, is evidence from which a jury may infer that a tenancy at will has been created between the parties (c).

By section 8, when any person shall be in possession as tenant from year to year, or other period, without any lease in writing, the right of entry, &c. of the person entitled subject thereto, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen.

(a) Doe d. Stanway v. Rock, 1 son, 6 Ad. & Ell. 721.
Car. & M. 549; 4 M. & G. 30. (c) Doe d. Bennett v. Turner, 7
(b) Doe d. Thompson v. Thompson, 6 Ad. & Ell. 721.
M. & W. 226; S. C. 9 M. & W. 643.

When a right of entry occurs to a reversioner by reason of a forfeiture or breach of condition, advantage must be taken of such forfeiture within twenty years next after the forfeiture was incurred, or the condition broken; but by section 4, it is provided, that if no advantage be taken by the reversioner of such forfeiture or breach of condition, then notwithstanding such forfeiture or breach of condition his right shall be deemed to have first accrued in respect of such estate at the time when the same shall become an estate in possession, as if no such forfeiture or breach of condition had happened.

By section 9, it is enacted, that when any person shall be in possession by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards is reserved, and the rent so reserved shall have been received by some wrongful claimant to such land in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved shall afterwards have been made to the person rightfully entitled thereto, the right of such rightful person subject to such lease, to make an entry, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by such wrongful claimant, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Thirdly, with respect to the issue of tenants in tail.

If tenant in tail die seised, the issue must bring their action within twenty years after the death; but if he do not die seised, then if he were then barred, his issue would be barred also. But if he were not then barred, the twenty years not having then expired, his issue has by section 22 the same time within which to bring his action that the tenant in tail would have had if he had lived.

And by section 23, when a tenant in tail shall have made an assurance, not operating to bar estates to take effect after, or in defeasance of his estate tail, and any person shall by virtue of such assurance be in possession, and the same person, or any other person whatsoever (other than some person entitled to such possession in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue in such possession for twenty years next after the commencement of the time at which such assurance if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person have operated to bar such estates as aforesaid; then at the expiration of such period of twenty years, such assurance becomes an effectual bar against any person claiming any estate whatsoever, to take effect after or in defeasance of such estate tail.

Fourthly, as to mortgagees.

When neither principal or interest has been paid upon a mortgage, the time of limitation begins to run from the date of the conveyance, unless it contain some stipulation to the contrary (a).

Fifthly, as to personal representatives.

The executor or administrator of a person who was in possession at the time of his death, must by section 2, bring his action within twenty years after the death of the testator or intestate; but if the testator or intestate were not in possession at the time of his death, then the representative must bring his action within the same time in which the deceased must have sued, if he were still living. And for the purposes of this act by section 6, in cases of administration, the interval of time between

(a) *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.

the death and the grant of the letters of administration is reckoned.

Sixthly as to ecclesiastical persons.

By section 29 it is provided, that any spiritual, or eleemosynary corporation sole, may make an entry, or bring his action within the following periods, next after the time at which the right shall first have accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years, as well, with the time of the holding of such two persons, and such six years make up the full period of sixty years.

Lastly as to persons under legal disabilities.

By section 16, it is provided, that persons labouring under any of the following disabilities at the time of their rights first accruing, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person or the person claiming through him, may notwithstanding the period of twenty years shall have expired, make an entry, or distress, or bring an action at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under any such disability, or shall have died, which shall have first happened, but it is provided nevertheless (by section 17,) that after the expiration of forty years next after the time at which any such right to make an entry, or bring an action shall have first accrued, such right shall be effectually bound, although the person under disability at such time may have remained under disability during the whole of such forty years, or although the

term of ten years, from the time at which he shall have ceased to be under any such disability or have died, shall not have expired. And by section 18, when any person under disability at the time at which his right first accrued shall die without having ceased to be under such disability, no time to make an entry or to bring an action beyond the twenty years next after the right of such person first accrued, or the ten years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

2. AS TO THE NATURE OF THE CLAIMANT'S TITLE.

The word title is here used in its ordinary signification, as denoting the claimant's legal, that is to say, actual right to the disputed property. Whenever the defendant has been let into possession by the lessor, or those under whom he claims, he is estopped from disputing the title in this sense of the word (*a*), although he may shew its subsequent expiration (*b*), and it is only incumbent on the claimant in such cases, to shew the manner in which the defendant obtained possession, and that his right to such possession has ceased. These cases chiefly arise where the relationship of landlord and tenant has subsisted between the parties, and will be treated of in a subsequent chapter. The present consideration is limited to those cases in which it is incumbent upon the claimant to shew some title to the possession beyond the mere cesser of right in the defendant to continue therein; and it may be convenient shortly to consider under separate heads, the particular persons who by reason of their estate and interest in the lands are entitled to maintain ejectment, and the rules by which those rights have been regulated.

(*a*) *Sullivan v. Stradling*, 2 Wils. 208; *Driver d. Oxenden v. Lawrence*, Blk. 1259; *Parker v. Manning*, 7 T. R. 537; *Hodson v. Sharpe*, 10 East, 355; *Doe d. Pritchett v. Mitchell*, 1 B. & B. 11.

(*b*) *England d. Syburn v. Slade*,

4 T. R. 682; *Doe d. Jackson v. Ramsbottom*, 3 M. & S. 516; *Doe d. Lowdon v. Watson*, 2 Star. 230; *Baker v. Mellish*, 10 Ves. jun. 544; *Gravenor v. Woodhouse*, 1 Bing. 38; *Phillips v. Pearse*, 5 B. & C. 433.

1. TENANT FOR YEARS—FOR LIFE—IN TAIL—OR IN FEE.

It has been said by a learned writer, that a tenant for years cannot before entry maintain an action of trespass, or *ejectment*; because those acts complain of a violation of the possession, and therefore cannot be maintained by any person who has not had an actual possession; (a) but this reasoning does not seem applicable to the modern principles of the remedy by ejectment (b).

2. MORTGAGEE.

After the mortgage becomes forfeited, the mortgagee may immediately proceed by ejectment against the mortgagor without any notice or demand of possession (c).

If the party in possession is not the mortgagor himself, but a person claiming under a tenancy created by the mortgagor prior to the mortgage, the mortgagee will be bound by it; (d) but

(a) 1 Cru. Dig. 248, *et vide*, 4 Bac. Ab. 183.

(b) Goodright d. Hare v. Cator, Doug. 477, 86.

(c) Doe d. Fisher v. Giles, 5 Bing. 421, S. C. 2 M. & P. 49.—The difficulties with which the Courts have been beset, in defining the situation of a mortgagor in possession, after a forfeiture of the mortgage, with respect to his mortgagee, are curious. In Moss v. Gallimore, Doug. 279, 82, Lord Mansfield says, "He is not properly a tenant at will to the mortgagee; he is like a tenant at will." In Buck v. Wright, 1 T. R. 381, Ashurst, J. says, "a mortgagor is as much, if not more like a receiver than a tenant at will: in truth, he is not either;" and again, "Mortgagors and mortgagees are characters as well known, and their rights, powers, and interests, as well settled, as any in the law."

In Partridge v. Ball, 5 B. & A. 604, it is said, *Per Curiam*, "a mortgagor is a tenant within the strictest definition of that word;" and the learned reporter commences a long note in the case reported, with this sentence, "As long as the mortgagor or his heir is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy between the parties;" whilst in Doe d. Robey v. Masey, 8 B. & C. 767, Lord Tenterden says, "The mortgagor is not in the situation of tenant at all, or at all events, he is not more than a tenant at sufferance, but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee."

(d) Doe d. Da Costa v. Wharton, 3 T. R. 2: Thunder d. Weaver v. Belcher, 3 East, 449.

if the tenancy be created subsequently to the mortgage, without the privity of the mortgagee, it will be no defence to an ejectment brought by the mortgagee; because the mortgagor has no power to let leases not subject to every circumstance of the mortgage (*a*). It seems also, that if the mortgagee demand from the mortgagor's tenant the interest due, and receive it from him in lieu of payment of rent, it will be such an admission of the lawfulness of the tenant's possession, as will preclude him from maintaining ejectment on a demise anterior to such payment, although it will not amount to an acknowledgment of a tenancy between himself and the party; but that payment of interest subsequent to the day of the demise by the mortgagor himself will not operate so as to legalize his tenant's possession up to that period as against the mortgagee (*b*). Where also the mortgagor grants a lease for years subsequent to the mortgage, and the mortgagee does some act amounting to a consent that the lessee shall become his tenant, he does not thereby set up the lease, but only creates a tenancy from year to year (*c*).

If the words of the conveyance creating the mortgage operate as a redemise of the premises to the mortgagor until default, it seems that the mortgagor is entitled to notice or demand of possession after default, before ejectment can be maintained against him, but that if the words do not so operate he will not be so entitled, although the conveyance expressly stipulates, that it shall be lawful upon default for the mortgagee to enter into possession "after giving one month's notice" (*d*). Where also the words do not operate as a redemise, the mortgagee is

(*a*) *Keech d. Warne v. Hall*,
Doug. 21.

(*b*) *Doe d. Whitaker v. Holls*,
7 Bing. 322; *Doe d. Rogers v. Cad-*
wallader, 2 B. & Ad. 473; *Evans*
v. Elliot, 9 Ad. & El. 342, *et vide*,
Rogers v. Humphrey, 4 Ad. & Ell.
299; *Doe d. Higginbottom v. Bar-*

ton, 3 Per. & Dav. 194.

(*c*) *Doe d. Hughes v. Bucknell*,
8 Car. & P. 566.

(*d*) *Wheeler v. Montifiore*, 2 Q.
B. R. 133; *Doe d. Lyster v. Gold-*
win, Ibid. 143; *Doe d. Parsley v.*
Day, Ibid. 147, and the authorities
there cited.

entitled to possession before default, notwithstanding a proviso, that it shall be lawful for him to enter upon and enjoy the premises after default (*a*).

If the mortgagee assign the mortgage, and the assignee assign to another, the last assignee may maintain ejectment for the mortgaged premises (*b*).

If there be two several mortgages of the same lands, the mortgagee who has the legal estate will be entitled to recover in an ejectment against the other mortgagee, although his mortgage be posterior in point of time (*c*).

3. LORD OF A MANOR.

When the tenant of copyhold premises has committed an act by which he forfeits his lands, he who is lord at the time of the forfeiture committed, may maintain an ejectment for the recovery of them; but this right is confined to the lord for the time being, unless the act of forfeiture destroy the estate, and then the heir of the lord, in whose time it was committed, may also take advantage of it (*d*).

Where, however, a copyholder, holding of a manor belonging to a bishopric, committed a forfeiture by felling timber during the vacancy of the see, the succeeding bishop was allowed to maintain an ejectment against him (*e*).

The right of the lord to maintain ejectment against his copyholder, for a forfeiture by committing waste, will not be taken away by an intermediate estate in remainder, between

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| (<i>a</i>) Doe d. Roylance v. Lightfoot, | 1 T. R. 755. |
| 8 M. & W. 553. | (<i>d</i>) Wat. Copy. vol. 1, 224 to 353; |
| (<i>b</i>) Smartle v. Williams, Salk. | Doe d. Tarrant v. Hellier, 3 T. R. |
| 245. | 162. |
| (<i>c</i>) Goodtitle d. Norris v. Morgan, | (<i>e</i>) B. N. P. 107. |

the life estate of the copyholder and the lord's reversion; for if it were, the tenant for life, and remainderman, by combining together, might strip the inheritance of all the timber (*a*).

When an inclosure has been made from the waste for twelve or thirteen years, and seen by the steward of the same lord from time to time without objection made, it may be presumed by the jury to have been made by the license of the lord, and upon such presumption an ejectment cannot be maintained by him against the tenant without a previous notice to throw it up (*b*).

It has never been expressly decided whether the Statute of Limitations will run against the lord, in case of a forfeiture by a copyholder, and bar his taking advantage of it after a lapse of twenty years; but from the language of Lord Kenyon, C. J., in the case of *Doe d. Tarrant v. Hellier*, it seems that its provisions would be applicable to this as well as to all other rights of entry (*c*).

An assignment of copyhold premises by a common law conveyance of lease and release without surrender to the lord of the manor, is not sufficient to support an ejectment by the relessee even against the widow of the releasor (*d*).

4. COPYHOLDER.

Whilst the ancient practice of the action of ejectment prevailed, it seems to have been holden, that a copyholder could not maintain an ejectment, upon a demise for a longer term than a year, unless the license of the lord were first obtained,

(*a*) *Doe d. Folkes v. Clements*, 2 Maul. & Sel. 68.

(*b*) *Doe d. Foley v. Wilson*, 11 East, 56.

(*c*) 3 T. R. 162, 172.

(*d*) *Doe d. North v. Webber*, 3 Bing. N. C. 922.

or a special custom existed in the manor enabling him to make longer leases: and, in some authorities, it is even doubted, whether an ejectment can in any case be supported by a copyholder (*a*). But since the introduction of the modern practice, these objections are wholly obviated, and the common consent rule is now sufficient to enable a copyholder to maintain ejectment.

A copyholder who claims by descent as *heir*, may maintain ejectment without admittance, as his title is complete against all the world, except the lord, immediately upon the death of the ancestor (*b*); but if it be necessary for him to proceed against the lord for a seizure on the death of the ancestor, he must prove that he has tendered himself to be admitted at the lord's Court, or that the lord has done some act dispensing with such tender (*c*).

When also the lord grants a reversion of a copyhold expectant on a life estate, as the grantee acquires a perfect title by the grant only, he may on the termination of the life estate maintain ejectment without admittance (*d*).

But in all cases where the copyholder claims as *surrender* (*e*), as the surrender and admittance make but one

(*a*) *Stephens v. Eliot*, Cro. Eliz. 483; *Goodwin v. Longhurst*, Cro. Eliz. 535; *Sparks' case*, Cro. Eliz. 676; *Downingham's case*, Owen, 17; *Eastcourt v. Weeks*, 1 Lut. 799, 803.

(*b*) *Rex v. Rennett*, 2 T. R. 197; *Doe d. Hinton v. Rolfe*, 3 Nev. & Per. 648; *Doe d. Taylor v. Crisp*, 6 Ad. & El. 779.

(*c*) *Doe d. Burrell v. Bellamy*, 2 M. & S. 87.

(*d*) *Roe d. Cash v. Loveless*, 2 B. & A. 453.

(*e*) In the case of *Doe d. Warry*,

v. Miller (1 T. R. 393), it was endeavoured to assimilate to copyhold principles, the practice of the Society of New Inn, in granting out their chambers for lives. It is customary with that Society, in such grants, to insert a clause, that the tenant shall not sell or assign, without the license of the Society, and for the grantees, when they wish to transfer their interest, to surrender the chambers' (upon a proper deed stamp) to the Treasurer and Ancients, to the intent that they shall grant the said chambers to the

conveyance (*a*), the legal title does not rest in the surrenderee, and of course he cannot maintain ejectment, until after admittance; but when admitted, the title relates back to the time of the surrender, against all persons but the lord; and therefore a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the times of admittance and surrender, provided the admittance be made before the day of the trial (*b*).

Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was holden that her devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the last surrenderor (*c*).

5. LESSEE OF A COPYHOLDER.

The privilege of the lessee of a copyholder to maintain ejectment, seems according to the old authorities, to have been formerly limited to those cases in which his lease was for one

transferree; which subsequent grant is never in point of fact made, but simply an entry of admittance inserted in the Society's books. It is therefore evident, that after the first surrender, the legal estate always remains in the Treasurer and Ancients, as trustees for the subsequent transferrees respectively, and that the terms *surrender* and *admittance* bear not the slightest resemblance in their meaning, to the surrender, and admittance to copyhold premises.

(*a*) *Roe d. Jeffereys v. Hicks*, 2 Wils. 13, 15.

(*b*) *Holdfast d. Woolhams v. Clapham*, 1 T. R. 600. *Doe d.*

Bennington v. Hall, 16 East, 208; *Ashurst, J.*, in delivering the judgment of the Court in *Holdfast d. Woolhams v. Clapham*, was of opinion that the surrenderee might maintain ejectment against his surrenderor, although not admitted before the trial, because the surrenderor is but *a trustee to his surrenderee*; but it should seem, since the legal estate remains in the surrenderor until the time of admittance, that this doctrine is not applicable to the present principle of the action. Vide *Doe d. Da Costa v. Wharton*, 8 T. R. 2; B. N. P. 109.

(*c*) *Doe d. Vernon v. Vernon*, 7 East, 8.

year only, or in which (being of longer duration) the license of the lord had been previously obtained or there was a special custom in the manor authorizing such leases (*a*), but it is now settled that a lessee for years, being a copyholder, may maintain ejectment, although he have not the license of the lord, and no special custom exists in the manor authorizing such leases, for the lease gives him a good title against every one but the lord (*b*).

6. WIDOW FOR HER FREE-BENCH.

When there is a custom in a manor that the widow shall enjoy, during her widowhood, the whole, or part of the customary lands, wherewith her husband died seised, as of free-bench, she may, after challenging her right, and praying to be admitted (*c*), maintain an ejectment for them without admittance, even against the lord; because it is an excrescence which, by the custom and the law, grows out of the estate (*d*).

But if the widow's claim be in the nature of dower, an ejectment will not lie before assignment (*e*), but she must levy a plaint in the nature of a writ of dower, in the lord's Court (*f*).

7. GUARDIAN IN SOCAGE (*g*), or TESTAMENTARY GUARDIAN appointed pursuant to the statute 12 Car. II. c. 24, s. 8. (*h*)

But a guardian for nurture cannot maintain ejectment, for

(*a*) Co. Copy. s. 5; Goodwin v. Longhurst, Cro. Eliz. 535.

(*b*) Doe d. Tressider v. Tressider, 1 Q. B. R. 416.

(*c*) Co. Copy. s. 5; Goodwin v. Longhurst, Cro. Eliz. 535.

(*d*) Doe d. Burrell v. Bellamy, 3 M. & S. 87.

(*e*) Jurdan v. Stone, Hutt. 18;

Howard v. Bartlett, Hob. 181; Doe d. Nutt v. Nutt, 2 C. & P. 430.

(*f*) Chapman v. Sharpe, 2 Show. 184.

(*g*) Litt. sec. 123, 124; Wade v. Cole, Ld. Raym. 130.

(*h*) Bedell v. Constable, Vaugh. 177; Doe d. Parry v. Hodgson, 2 Wils. 129.

he cannot make leases for years, either in his own name, or in the name of the infant; because he has only the care of the person, and education of the infant, and has nothing to do with the lands merely in virtue of his office (a).

8. INFANT.

It is difficult to discover any principle upon which both infant and guardian can have the right of maintaining ejectment for the same lands, but it seems notwithstanding that they do possess such right. In the case of *Doe d. Holsworth v. Hancock*, *coram* Park, J., tried at the Derby Summer Assizes, 1836, the lessor of the plaintiff was an infant, aged nineteen years, and the tenancy was proved to have been made with the plaintiff as testamentary guardian, and the learned Judge ruled that the demise was properly laid, and refused to reserve the point.

9. ASSIGNEE OF A BANKRUPT, OR INSOLVENT DEBTOR.

By the operation of the present Bankrupt Acts, all the real and personal property of the bankrupt, both present and future, vests in the official assignee by the mere effect of the commissioner's appointment; and when the trade assignees are chosen, and their appointments signed by the commissioners, the property then vests in them and the official assignees jointly (b).

The only exceptions are estates tail and copyhold, which must be duly assigned by the commissioners (c).

Where a tenant in fee simple of customary land, which passed by bargain and sale with surrender and admittance, became bankrupt, and the commissioners assigned the land to the as-

(a) Ratcliff's case, 3 Co. 37.

(c) 3 & 4 Wm. IV. c. 74, s. 55,

(b) 1 & 2 Wm. IV. c. 56, s. 25, 73; 6 Geo. IV. c. 16, s. 68, 69.

26; 5 & 6 Vict. c. 122, s. 48.

signees, and the bankrupt died, and after his death the assignees were admitted, upon ejectment brought on the several demises of the heir of the bankrupt and of the assignees, both being before the day of the admittance, the Court held, that the title was not in abeyance from the time of the assignment to the time of the admittance, but did not decide whether it passed by the assignment to the assignees, or remained in the heir until admittance (a).

When a trader being seised of an estate for life, with a general power of appointment, with remainder in default to himself in fee, executed his appointment after an act of bankruptcy, and was then declared bankrupt, and duly assigned the premises to his assignee: it was held that the appointment was void, and that the legal title passed to the assignee (b).

A difference prevails between cases of bankruptcy and insolvency, where the party is possessed of a term of years. In the former case, the term does not pass by the assignment of the commissioners to the assignees, unless they elect to accept it; and if they decline to accept, the term will remain in the bankrupt, as though no commission had issued, unless he deliver up the lease within fourteen days to the lessor, and he may maintain ejectment, if ousted, notwithstanding his bankruptcy. But in the case of an insolvent debtor, the term vests absolutely in the provisional assignee by the assignment to him; and if the assignee subsequently appointed should elect not to accept the term, it will not revert to the insolvent, but the lessor must make his application to the Insolvent Court, who have power to make such order therein as they shall deem just. (c)

(a) Doe d. Danson v. Parke, 4 Ad. & El. 816. d. Palmer v. Andrews, 4 Bing. 348; Doe d. Clarke v. Spencer, 3 Bing.

(b) Doe d. Coleman v. Britain, 2 B. & A. 93; vide 6 Geo. IV. c. 16, s. 81. 203, 370; Copeland v. Stephens, 1 B. & A. 593; Crofts v. Pick, 8 Moore, 384; S. C. 1 Bing. 154;

(c) 6 Geo. IV. c. 16, s. 75; 7 Geo. IV. c. 57, s. 23; 1 Wm. IV. Doe Lindsay v. Limbert, 2 C. & P. 526.

10. CONUSEE OF A STATUTE-MERCHANT OR STAPLE (a).

11. TENANT BY ELEGIT.

It is laid down in the case of *Lowthal v. Tomkins* (b), that if a tenant by *elegit* desire to obtain *actual* possession of the lands, he must bring an ejectment, for the sheriff under the writ, delivers only the *legal* possession; which doctrine is recognised by Lord Kenyon, C. J. in the case of *Taylor v. Cole*; (c) but in the case of *Rogers v. Pitcher*, (d) it is said by Gibbs, C. J. "I am aware that it has in several places been said, that the tenant in *elegit* cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case in which a party may maintain ejectment in which he cannot enter. The ejectment supposes that he has entered; and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not however, consider the present case as now deciding these points which I only throw out in answer to the argument that has been used."

When a tenant in possession claimed under a lease granted prior to the date of the judgment against his lessor, it was held that the tenant by *elegit* could not recover in ejectment; because the lessee's title being prior in point of time, the legal estate was in him; (e) but where the possession of the tenant was subsequent to the date of the judgment, although prior by two years to the issuing of the writ of *elegit* and inquisition thereon, the title of the tenant by *elegit* was not barred. (f) If, however, the tenant does not himself claim this protection, but suffers judgment by default, it will not avail the

(a) Co. Litt. 42 (a); *Hammond v. Wood*, Salk. 563.

(b) 2 Eq. Ca. Ab. 380.

(c) 3 T. R. 295.

(d) 6 Taunt. 202.

(e) *Doe d. da Costa v. Wharton*, 8 T. R. 2.

(f) *Doe d. Putland v. Hilder*, 2 B. & A. 782.

judgment debtor, though he may appear as landlord and defend the action. (a)

12. PERSONAL REPRESENTATIVE. (b)

This right is of course confined to those lands which the testator, or intestate, held for a term of years; but it is immaterial whether the ouster be after, or before the death of the testator, or intestate. (c)

Personal representatives may recover in ejectment under the statute 29 Car. II. c. 3, s. 12, appropriating estates held *pur autre vie* where there is no special occupant. But this statute does not extend to copyholds, and therefore one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, was not permitted to maintain ejectment. (d)

13. DEVISEE.

Where the devise is of a freehold interest, the devisee may immediately, and without any possession, maintain ejectment for the lands devised; (e) but if it be a legacy of a term of years, he must first obtain the assent of the executors to the bequest (f). When however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger. (g)

14. GRANTEE OF A RENT-CHARGE, having power to enter

(a) Doe d. Cheese v. Creed, 2 M. & P. 648.

(b) 4 Edw. III. c. 7.

(c) Slade's case, 4 Co. 92, 95.
(a); Doe d. Shore v. Porter, 3 T. R. 13.

(d) Zouch d. Forse v. Forse, 7 East, 186.

(e) Co. Litt. 240, (b).

(f) Young v. Holmes, Stran. 70.

(g) Doe d. Lord Say and Sele v. Guy, 3 East, 120.

upon the lands, if the rent be in arrear, and hold them until satisfaction. (a)

These rights of entry are always taken strictly: and where a man gave a leasehold estate by will to *B.*, his executors, &c., subject to a rent-charge to his wife during her widowhood, with a power to the *widow* to enter for non-payment of rent, and to enjoy, &c. until the arrears were satisfied, and in case of the widow's marriage, he willed that *B.* should pay the rent-charge to *C.*, his executors, administrators, and assigns, it was holden that *C.*'s executors, after the widow's marriage, and *C.*'s subsequent death, had no right of entry for non-payment of the rent-charge. (b)

15. ASSIGNEE OF THE REVERSION, upon a Right of Re-entry for condition broken. (c)

By the common law, no one could take advantage of a condition or covenant but the immediate grantor, or his heirs; a principle consistent with the old feudal maxims, but highly injurious to the rights of grantors, when the practice of alienating estates became general, and leases for years a valuable possession. To remedy this evil, it is enacted by the 32 Hen. VIII. c. 34, that the grantees, or assignees of a reversion shall have the same rights and advantages, with respect to the forfeitures of estates, as the heirs of individuals, and the successors of corporations, had until that time solely enjoyed; and this statute is made most general in its operation, by particularly including the grants from the Monarch of those lands, which had then recently become the property of the Crown by the dissolution of the monasteries.

(a) *Jemott v. Cowley*, 1 Saund. 112. waite, Willes, 500.

(c) 32 Hen. VIII. c. 34.

(b) *Hassell d. Hodson v. Gowth-*

The words of the statute grant the privilege of re-entry to the assignees "for non-payment of rent, or for doing waste, or *for other forfeiture*;" but these latter words have been limited in their interpretation to "*other forfeiture of the same nature*," and extend to the breach of such conditions only, as are incident to the reversion, or for the benefit of the estate. Thus the assignee may take advantage of conditions for keeping houses in repair, for making of fences, scouring of ditches, preserving of woods, &c. but not of collateral conditions, as for the payment of a sum in gross, or for the delivery of corn, or wood, or such like. (a)

In Spencer's case, (b) many differences are taken and agreed between collateral or personal covenants, and covenants which run with the land or are incident to the reversion; and much learning is displayed, which it would be foreign to the purpose of this Treatise to discuss; but it may be useful to present a concise view of the decided cases.

A. covenanted for himself, his executors and administrators, that he would build a wall upon part of the land demised; the assignee was not bound by this covenant, because the wall was not *in esse* at the time of the demise made, but to be newly built after; but it was resolved, that if the lessee had covenanted for himself *and his assigns* expressly, it would have bound the assignee, although the wall was not *in esse*, inasmuch as what was covenanted to be done, was to be done on the land demised; (c) but if the matter covenanted to be done does in no manner touch or concern the thing demised, as to build a wall on other land, or pay a collateral sum to the lessor, the assignee, though named, will not be bound (d).

(a) Co. Litt. 215, (b).

(b) 5 Coke, 16.

(c) Spencer's case, 5 Co. 16;

Bally v. Wells, 3 Wils. 25.

(d) Vernon v. Smith, 5 B. & A. 1.

A covenant in a lease of land; that the lessee or his assigns will not hire persons to work on the demised premises who are settled in other parishes, is a collateral covenant, and does not bind the assignee, although expressly named; for it does in no way affect the thing demised, although it may collaterally affect the lessor by increasing the poor rates upon him. (a)

A covenant to supply the demised premises with good water during the term runs with the land, for it is a covenant which respects the premises demised, and the manner of enjoyment. (b)

A covenant to insure against fire, premises situated within the weekly bills of mortality mentioned in 14 Geo. III. c. 78, is a covenant that runs with the land; because by the operation of the 83rd section (which enables the landlord, by application to the directors of the insurance office, to have the sum insured laid out in rebuilding the premises) this is in effect a covenant to lay out a given sum of money in rebuilding or repairing premises in case of damage by fire, which clearly is a covenant running with the land. Best, J. was of opinion, that if the premises had not been within the limits of the act, it would not have varied the case, *because the original covenantee could not avail himself of the covenant*, inasmuch as after the assignment he sustains no loss by the destruction of the buildings; and "a covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned;" and he defines *collateral covenants* to be such covenants as are beneficial to the lessor, without regard to his continuing the owner of the estate; but the judgments of the other Judges proceeded entirely on the ground of the locality of the premises. (c)

(a) *The Mayor of Congleton v. A. 266.*
Pattison, 10 East, 130.

(c) *Vernon v. Smith, 5 B. & A. 1.*

(b) *Jourdan v. Wilson, 4 B. &*

A. being seised of a mill, and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises; this reservation of the suit to the mill is in the nature of a rent, and the implied covenant to render it resulting from the *reddendum*, is a covenant that runs with the land, *so long as the ownership of the mill and the demised premises belong to the same person* (a)

A condition that a lessee shall not assign over his term, without license from the lessor, is a collateral condition; and cannot be taken advantage of by the assignee of the lessor (b).

The assignee of part of the reversion in all the lands demised, is an assignee within this statute, but the assignee of the reversion in part of the lands is not; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. If, therefore, *A.* be lessee for years of three acres, with condition of re-entry, and the reversion of all the *three acres* be granted to *B.* *for life*, or *for years*, *B.* can take advantage of the breach of the condition; but if a reversion of any nature whatsoever, even *in fee*, of *two acres* only be granted to *B.*, he cannot (c).

A *cestui que use*, and bargainee of the reversion, are within this statute, because they are assignees by act of the party; but it does not extend to persons coming in by act of the law, as the lord by escheat (c); nor to an assignee by estoppel only (d); nor to one who is in of another's estate, and, therefore,

(a) *Vivyan v. Arthur*, 1 B. & C. 410. Pennant's case, 3 Co. 64.

(c) Co. Litt. 215. (a).

(b) *Lucas v. How*, Sir T. Raym. 250; *Collins v. Silley*, Stiles, 265;

(d) *Awder v. Nokes*, Moore, 419.

if the reversion, expectant on the determination of the term, be merged in the reversion in fee, the reversion is no longer within the statute (*a*).

This statute is held not to extend to gifts in tail (*b*), but copyhold lands are within its intention and equity (*c*).

16. CORPORATION AGGREGATE OR SOLE.

It was formerly doubted whether an ejectment could be maintained by the King, because an ejectment is for an injury done to the possession, and the King cannot be put out of possession. But this reasoning seems only to apply where the King is made *plaintiff*, and not where he is the *lessor of the plaintiff*; for it is the lessee, and not the lessor, who by the legal fiction is supposed to be ousted; and it is held, that where the possession is not *actually* in the King, but in lease to another, there, if a stranger enter on the lessee, he gains possession without taking the reversion out of the Crown, and may have his ejectment to recover the possession, if he be afterwards ousted; because there is a possession *in pais*, and not in the King, and that possession is not privileged by prerogative. Hence it follows, that the *King's lessee* may likewise have an ejectment to punish the trespasser, and to recover the possession which was taken from him (*d*).

In cases, however, included in the statutes 8 Hen. VI. c. 16, and 18 Hen. VI. c. 6, which prohibit the granting to farm of lands, seised into the King's hands upon inquest before escheators, until such inquest shall be returned in the Chancery or Exchequer, and for a month afterwards, if the King's title in the same be not found of record, and avoid all grants

(*a*) *Threr v. Barton*, Moore, 94;
Chaworth v. Phillips, Moore, 876;
Webb v. Russell, 3 T. C. 393, 401.

(*b*) Co. Litt. 215, (*a*).

(*c*) *Glover v. Cope*, Carth. 205.

(*d*) *Payne's case*, 2 Leon. 205;
Lee v. Norris, Cro. Eliz. 331.

made contrary thereto, the King cannot maintain an ejectment until all the previous requisites are complied with: for, even presuming the right and possession to be in the Crown immediately on the death of the person last seised, the King has no power to grant the same until after office found, and, consequently, he must be considered to be himself in possession, and therefore unable to give a title to his lessee (a).

17. CHURCHWARDENS AND OVERSEERS OF THE POOR for lands belonging to the parish.

To remedy the practical inconveniences which frequently arose from the difficulty of substantiating a legal title to parish lands (b), it was enacted by the statute 59 Geo. III. c. 12, s. 17, that churchwardens and overseers of the poor, and their successors, should take and hold *in the nature of a body corporate*, for and on behalf of the parish, all buildings, lands, and hereditaments belonging to the parish; and that in all actions, suits, and other proceedings for or in relation to any such buildings, lands, or hereditaments, it shall be sufficient to name the overseers and churchwardens of the poor for the time being, describing them as churchwardens and overseers of the poor of the parish for which they shall act, and that no suit or other proceeding shall abate by reason of the death of any such churchwarden or overseer.

In order to constitute the body corporate intended by this act, there must be two overseers, and a churchwarden or churchwardens; and where there were two overseers appointed, one of whom was afterwards appointed (by custom) sole churchwarden, the act did not vest parish property in them (c).

(a) Doe d. Hayne v. Redfern, 13 East, 96.

(b) Doe d. Grundy v. Clarke, 14 East, 488.

(c) Woodcock v. Gibson, 4 B. & C. 462; Phillips v. Pearse, 5 B. &

C. 433.

Leases of parish lands granted by churchwardens and overseers before the passing of the above statute convey no interest to the lessees, and the statute vests in the churchwardens and overseers all buildings, lands, and hereditaments belonging to the parish, not merely where the rents are applicable to the relief of the poor, but also where they are applicable to those purposes for which church rates are levied, and that although the buildings, &c., had originally been vested in trustees for the benefit of the parish (*a*).

The legal estate in the parish land belonging to a parish forming part of an union under 4 & 5 Wm. IV. c. 76, is not divested out of the churchwardens and overseers so as to disable them from bringing ejectment, either by section 21 of that act, or by 5 & 6 Wm. IV. c. 69, s. 3.—Lord Denman, C. J. observing, that “although the language of the late acts is so large as hardly to be consistent with the notion that any property of a parish forming part of an union remains in the parish officers, yet that language is not sufficient to divest that property out of them.” (*b*)

18. LAY IMPROPRIATORS FOR TITHES (*c*).

The statute giving this remedy for tithes included lay impropriators only, but was subsequently extended to tithes belonging to ecclesiastical persons (*d*). But an ejectment for tithes can only be maintained against persons claiming or pretending to have title thereto, and not against such persons as refuse or deny to set them out, which is called subtraction of tithes (*e*): nor will it lie where the tithes are not taken in kind, but an annual sum is paid in lieu thereof (*f*).

(*a*) Doe d. Jackson v. Hiley, 10 Per. & Dav. 270.

B. & C. 885; Doe d. Higgs v. (*c*) 32 Hen. VIII. c. 7.

Terry, 4 Ad. & El. 274; Doe d. (*d*) Vide 6 & 7 Wm. IV. c. 71.

Hobbs v. Corkell, 4 Ad. & El. 478. (*e*) 2 & 3 Edw. VI. c. 13, s. 13.

(*b*) Doe d. Norton v. Webster, 4 (*f*) Dyer, 116, (*b*).

19. TRUSTEES.

In all cases in which the trusts are not executed by the Statute of Uses, the legal estate vests in the trustees, and of course in such cases they may maintain ejectment.

The principles upon which this doctrine is founded, have already been discussed (*a*); and it therefore only remains to consider a few cases, in which the trustees have been held to take, or not to take, the legal estate.

A distinction has been made between a devise to a person in trust *to pay over* the rents and profits to another (*b*), and a devise in trust *to permit some other person to receive* the rents and profits; the legal estate, in the first case, being held to be vested in the trustee, and, in the latter, in the *cestui que trust*; though, to use the words of Sir James Mansfield, C. J. "It seems miraculous how such a distinction became established; for good sense requires that in both cases it should be equally a trust, and that the estate should be executed in the trustee;—for how can a man be said to permit and suffer, who has no estate, and no power to hinder the *cestui que trust* from receiving?" (*c*) It has, indeed, in several cases, been argued, that a devise to trustees to receive the rents and profits, and pay them over, will not vest the legal estate in the trustees, unless something is required of the trustees which renders it necessary that they should have an interest in the lands, as to pay rates and taxes, &c.; but this doctrine has not yet been sanctioned by any decisions of the Courts; though certainly it has happened in all the later cases, that

(*a*) Ante, 33.

(*b*) Shep. Touch. 482; 1 Eq. Cas. Ab. 383, 384; Shapland v. Smith, Brown, Chan. Cas. 75; Silvester d. Law v. Wilson, 2 T. R. 444; Jones v. Ld. Say and Sele, 8 Vin. Ab. 262; Broughton v. Langley,

Salk. 679; S. C. 1 Lut. 814; Burchett v. Durdant, 2 Vent. 311; Tenny d. Gibbs v. Moody, 3 Bing. 3.

(*c*) Doe d. Leicester v. Biggs, 2 Taunt. 109, 113.

the trustees have been required to do other acts, as well as to pay the rents and profits (a).

In cases where it is necessary for the purpose of the trust that the trustees should take the legal estate, it will be held to vest in them, though the devise be, that *they suffer and permit the cestui que trust* to receive the rents and profits; as where the trust was, to permit a *feme covert* to receive the rents and profits, during her natural life, for her sole and separate use, they were held to have the legal estate; such construction being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the *feme covert* (b). And where lands were conveyed to trustees in trust, with the consent of A., to sell the inheritance, with a proviso, that the rents, until such sale should *be received by such person, and for such uses*, as they would have been if the deed had not been made, it was held that the estate was executed in the trustees; and that it was not a mere power of sale annexed to the legal estate of the owner (c).

In like manner, where the devise was to A. in trust, to permit and suffer the testator's widow to have, hold, use, occupy, possess and enjoy the full free and uninterrupted possession and use of all interest of monies in the funds, and rents and profits arising from the testator's houses for her natural life, if she should remain unmarried; and that her receipts for all rents, &c. with the approbation of any of the trustees, should be good and valid, she providing for and

(a) Jones v. Ld. Say and Sele, 652.

3 Vin. Ab. 262; Kenrick v. Lord Beauclerk, 3 B. & P. 175; Doe d. Hallen v. Ironmonger, 3 East, 533; Doe d. Stevens v. Scott, 4 Bing. 505; White v. Parker, 1 B. N. C. 573.

(b) Harton v. Harton, 7 T. R.

(c) Keene d. Ld. Byron v. Dear-don, 8 East, 248; so also of a devise on trusts to convey; Doe d. Booth v. Field, 2 B. & Ad. 564; Doe d. Shelley v. Edlin, 4 A. & E. 582.

educating properly the testator's children, and also paying certain annuities; and in case the widow should marry again, then upon certain other trusts; it was held that the use was executed in the devisees in trust, and upon this ground, that the testator, having made the approbation of the trustees necessary to the widow's receipts, showed that he did not intend to give her a legal estate; and Gibbs, J. said, "The rule has been misconceived. Though an estate be devised to *A.* and his heirs, to the use of *B.* and his heirs, the Courts will not hold it to be an use executed, unless it appears by the whole will to be the testator's intent that it should be executed. The Courts will rather say the use is not executed, because the approbation of the trustee is made necessary, than that the approbation of a trustee is not necessary because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees. 'I leave my wife to receive the rents, provided there is always the controul of one of the trustees upon her receipts.'—The testator, therefore, certainly meant that some controul should be exercised,—and what could that controul be, except they were to exercise it in the character of trustees?" (a)

Where certain *freehold and leasehold* premises were devised to trustees, "to *permit and suffer* the testator's wife to receive and take the rents and profits," and other lands were devised to the same trustees, upon trusts clearly not executed by the statute, and immediately after the last of the different devises a proviso followed, "that it should be lawful for the trustees, at any time, till *all* the said lands, &c. devised to them, *should actually become vested in any other person or persons, by virtue of the will, or until the same, or any part thereof, should be absolutely sold as aforesaid, to lease the same, or any part thereof,*" it was holden, that the legal estate in the freehold lands contained in the first devise, vested in

(a) *Gregory v. Henderson*, 4 Taunt. 772.

the widow, notwithstanding that *leasehold* premises were contained in the same devise, (the legal interest in which, of course, vested in the trustees), and the subsequent leasing power given by the will, "the trustees having no controul over the lands in the first devise for *any purposes of the testator's will*" (a).

Where the devise was, that the trustee *should pay unto*, or else *permit and suffer* the testator's niece *to receive* the rents, the legal estate was held to be in the niece, because the words "to permit and suffer" came last; and in a will, the last words prevail, though in a deed the first (b).

In a case where the devise was, "I give and bequeath *my real estates, lands, &c.* and also my personal estate, &c. to *A. B.*, upon trust, to the intent that the said *A. B.*, his heirs, &c. shall first dispose of my personal estate, or so much thereof as shall be sufficient for that purpose, in payment of my debts, &c. and as to all my real estates, *wheresoever and whatsoever*, subject to my debts, and such charge or charges as I may now, or at any time or times hereafter, think proper to make, I give, devise, and bequeath the same to *C. D.*, for the term of his natural life, with remainder to *E. F.*, &c." it was holden that the legal estate was vested in *C. D.*, because an intention that the trustees should pay the debts was not apparent on the face of the will, and therefore there was no reason for giving the legal estate to the trustees. (c).

Where freehold estates are devised to trustees, difficult questions frequently arise, as to the quantum of estate taken by the trustees, which it would be foreign to the purposes of this Treatise to discuss; but it may be laid down as a general

(a) Right d. Phillips v. Smith, 12 East, 455.

(b) Doe d. Leicester v. Biggs, 2 Taunt. 109; Mansfield, C. J. in delivering the judgment of the Court

in this case, said, the reason they assigned for their decision was given for want of a better.

(c) Kenrick v. Beaucherk, 3 B. & P. 175.

principle, that, previously to the introduction of the statutory rules of construction presently noticed, a devise to trustees, if it gave them any estate, would give them such estate as would have passed by similar words in a beneficial devise, unless the exigencies of the trust could be satisfied with less. But that, if the exigencies of the trust could be so satisfied, (as for example, by a freehold estate *pour autre vie*, where the only trust was for the life of the *cestui que trust*, or by an indefinite chattel interest, where the trust was to raise a sum of money), the use of language, which in a beneficial devise would have passed the fee, would not preclude a more limited construction, so that the less estate only should be taken, and not the fee (a). And of course, in such cases, the trustees could not, after the determination of such less estate, maintain ejectment.

The same rule still prevails, except in those cases which are affected by the statutory rules of construction, introduced by the stat. 1 Vict. c. 26, s. 30, 31.

By the 30th section of that act, it is enacted, that "where any real estate (other than or not being a presentation to a church), shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest, which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication." And by the 31st section, that "where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof, shall not be given to any person for life or such beneficial interest shall be given to any person

(a) Doe d. Tomkyns v. Willan, 2 B. & A. 84; Doe d. Keen v. Walbrook, 2 B. & Ad. 554; Nash v. Coates, 3 B. & Ad. 839; Doe d. Rees v. Williams, 2 Mee. & W. 749; Doe d. Davies v. Davies, 1 Q. B. Rep. 430; Ackland v. Pring, 3 Scott, N. S. 297.

for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee, the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

The operation of these two sections, so far as it is material to the present Treatise, appears to be, that they leave untouched the principal question, *viz.* whether the legal estate is executed in the trustee or in the *cestui que trust*; but that, assuming some estate to be vested in the trustee, they operate on the amount of such estate: the 30th clause directing that the whole estate shall pass, unless the devise be expressly or by implication confined to a definite term or an estate of freehold; and the 31st providing that no such implication shall be drawn from the limited exigencies of the trust, unless where the only trust is for a life estate (*a*).

As the Statute of Uses mentions only such persons as are *seised* to the use of others, it has been held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*; and therefore, when only a term of years is created, whatever the nature of the trusts may be, the statute does not execute the uses, but the legal estate always vests in the trustees (*b*). Such terms do not cease when the trusts are satisfied, unless by special proviso in the deed itself; so that the legal estate, however ancient the term may be, and notwithstanding it may have been assigned to attend the inheritance will always remain outstanding in the trustees until it has been surrendered to the party beneficially interested, or merges in a larger estate. The practical inconveniences arising from this rule of the

(*a*) See these sections commented on in 2 Jarman on Wills, 229; Sugden on Wills, 119.

(*b*) Dillon v. Fraine, Poph. 70, 76; Dyer, 369; Jenk. 244.

common law as regards the legal rights of the *cestui que trust*, have given rise to the doctrine of presumed surrenders; and juries have been directed to presume that regular surrenders have been made by the trustees of such terms, so as thereby to clothe the *cestui que trust* with the legal estate, and enable him to recover in ejectment, without burthening the case with demises by the trustees or their representatives, or the costly proofs necessary thereon. Thus surrenders have been presumed if the purposes of the trust estate have been satisfied (*a*); or if the beneficial occupation of the estate by the possessor induces a supposition, that a conveyance of the legal estate has been made to the party beneficially interested (*b*); or where it is for the interest of the owner of the inheritance, that the term should be considered as surrendered (*c*), or when the trust is a plain one, and a Court of Equity would compel the trustees to make a conveyance (*d*). But such presumptions will not be made if the surrender be a breach of the trust; or against the owner of the inheritance who is interested in upholding it (*e*); or where the title of the party, for whom the presumption is required, is a doubtful equity only, until a Court of Equity has first declared in favour of the equitable title (*f*); nor can the presumption be made by the Court, where the merits of the case would have warranted such presumption at the trial, if it appear, upon a special verdict, or special case reserved for their opinion, that the trust-estate, though satisfied, is still, in point of fact, outstanding in the trustees (*g*).

But this doctrine of presumed surrenders seems to be

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| (<i>a</i>) Doe d. Hodson <i>v.</i> Staple, 2 T. R. 684; Doe d. Davis <i>v.</i> Davis, 1 Q. B. R. 430. | (<i>e</i>) Doe d. Graham <i>v.</i> Scott, 11 East, 478. |
| (<i>b</i>) Doe d. Rees <i>v.</i> Williams, 2 M. & W. 749. | (<i>f</i>) Keene d. Lord Byron <i>v.</i> Deardon, 8 East, 248. |
| (<i>c</i>) Doe d. Burdett <i>v.</i> Wright, 2 B. & C. 710. | (<i>g</i>) Goodtitle d. Jones <i>v.</i> Jones, 7 T. R. 43; <i>vide</i> Doe d. Pullard <i>v.</i> Hilder, 2 B. & C. 782; Doe d. Blacknell <i>v.</i> Plowman, 2 B. & Ad. 573. |
| (<i>d</i>) Doe d. Syburn <i>v.</i> Slade, 4 T. R. 682. | |

abolished by the provisions of the statute 8 & 9 Vict. c. 112, ss. 1 and 2.

By sect. 1 of that statute, it is enacted "that every satisfied term of years which, either by express declaration or by construction of law shall upon the 31st day of Dec. 1845 be attendant upon the inheritance or reversion of any lands shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine shall afford to every person the same protection against every incumbrance charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st day of December 1845, and shall for the purpose of such protection be considered in every Court of Law and of Equity to be a subsisting term."

By sect. 2, it is enacted "that every term of years now subsisting, or hereafter to be created, becoming satisfied after the said 31st day of December 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands shall immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid."

The operation of these sections appears to be, that an outstanding term made attendant upon the inheritance by express declaration before December 31st, 1845, is still to be considered as existent for the purpose of such protection to all persons as it would have afforded to them before the passing of the statute. Such terms, therefore, must hereafter be deemed existent or non-existent at the trial of any ejectment, as the same shall or

shall not afford a protection within the meaning of the statute, to the party setting up the term, so that a surrender *cannot* in such cases be presumed; and with respect to all other cases, it is expressly declared, that a satisfied attendant term (subject of course to any questions as to what constitutes satisfaction) is *ipso facto* determined, and consequently it is unnecessary to call in aid the doctrine of presumed surrender.

Where the demised premises are settled for life on *A.*, with power to charge the estate with portions, and power to grant leases for twenty-one years; and *A.* granted and appointed the same for five hundred years to trustees upon trust, if she should by deed so appoint, to raise such portions; and after such grant and appointment, leased the premises for twenty-one years to *B.*; it was held, that taking the whole deed together, the term, until it was called into action, was subservient to the leasing power; and was therefore no answer to an ejectment brought by *B.* (*a*).

It seems to have been held, in the case of *Roe d. Ebrall v. Lowe* (*b*), that a *bond fide* lease, made by an equitable tenant in tail, will prevent the trustees, in whom the legal estate is vested, from recovering in ejectment against the lessee; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. But this principle cannot now be supported, and a lease from the *cestui que trust* cannot be set up against the trustee in any case, without the aid of a Court of Equity (*c*).

Copyhold estates also are not comprehended within the Statute of Uses; because a transmutation of possession, by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of the lord's rights, and would tend to his prejudice; and therefore, if a copyhold

(*a*) *Doe d. Courtall v. Thomas*,
9 B. & C. 288.

(*c*) *Baker v. Mellish*, 10 Ves. Jr.
544.

(*b*) 1 H. Bl. 446.

be surrendered to *A.* to the use of *B.* the legal estate will not be transferred to *B.*, though he would be entitled in equity to the rents and profits, and to call upon *A.* for a surrender of the estate (*a*).

20. JOINT TENANT, COPARCENER, OR TENANT IN COMMON, against his companion on an actual ouster.

It is a maxim of the common law, that the possession of one joint tenant, parcener, or tenant in common is *primâ facie* the possession of his companion also (*b*). And it therefore follows, that the possession of one joint tenant can never be considered by the common law as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or, in other words, whenever one joint tenant, parcener, or tenant in common is in possession, his fellow is, in *contemplation of the common law*, in possession also, and it is necessary, in order to enable his companion to maintain ejectment, to rebut this presumption by proof of *an actual ouster*.

Many subtle distinctions have been heretofore taken as to what acts shall be deemed to amount to an actual ouster (*c*); and it was in one case expressly decided that the bare perception of the whole profits for twenty-six years without accounting was insufficient (*d*); but these difficulties are ended by stat. 3 & 4 Wm. IV. c. 27, s. 12, which abrogates this maxim of the common law, and enacts that when any person entitled to any land or rent as coparcener, joint tenant, or tenant in common, shall have been in possession or receipt of

(*a*) Co. Cop. s. 54, Gilb. Ten. 512; Peaceable d. Hornblower v. Read, 1 East, 568, 574; Story v.

(*b*) Ford v. Gray, Salk. 285; Windsor, 2 Atk. 630, 632; Doe d. Smales v. Dale, Hob. 120; Doe d. Thorn v. Phillips, 3 B. & Ad. 752; Barnet v. Keen, 7 T. R. 386. Doe d. Wawn v. Horn, 5 M. & W.

(*c*) Doe d. Fisher v. Prosser, 564.

(*d*) Fairclaim d. Fowler v. Shackleton, Bur. 2604.

the entirety, or more than his undivided share of the land or rent, for his own benefit or the benefit of any person other than the person entitled thereto, such possession or receipt shall not be deemed to have been the possession or receipt of the person so as aforesaid entitled.

It follows as a corollary from this enactment, that one joint tenant, parcener, or tenant in common, may always maintain ejectment against his companion, who is in possession of more than his share of the land, or receipt of more than his share of the rent; because such possession is no longer the possession of his co-tenant.

This 12th section of the statute 3 & 4 Wm. IV. c. 27, has a retrospective operation, and makes the possession of tenants in common, &c. separate from the commencement of the tenancy in common, &c., and not merely from the time of the act passing; the statute therefore runs from the commencement of the tenancy (a).

21. LUNATIC.

The ejectment must be brought in the name of the lunatic; for his committee is but a bailiff, and has no interest in the land (b).

22. AN ATTAINTED FELON, before office found (c).

23. POSSESSION, UNACCOMPANIED BY ACKNOWLEDGMENT OF TITLE IN ANOTHER PERSON.

It has already been observed that possession is *prima facie*

(a) *Sulley v. Doe d. Taylerson*, 11 Ad. & El. 1008. *v. Palmer*, 2 Wils. 130; *sed vide* 43 Geo. III. c. 75.

(b) *Drury v. Fitch*, Hutt. 16; *Cocks v. Darson*, Hob. 215; *Knipe* (c) *Doe d. Griffiths v. Pritchard*, 5 B. & Ad. 765.

evidence of ownership (*a*); and as between two parties who rely upon possession solely, the presumption of ownership is in favour of the first possessor (*b*); so that proof of possession by a claimant, however short, will entitle him to recover unless the defendant can account for such possession, or shew a prior possession or title in himself or a third person.

The stat. 3 & 4 Wm. IV. c. 27, enacts, that every claimant to lands must enforce his right, and pursue his remedy within twenty years next after his right of entry accrues (excepting of course those cases of disability which are specially provided for), and defines with great precision, the time at which in every case the right shall be taken to have first arisen, and the modes by which it is to be enforced; and it is enacted, by section 27, that "at the determination of the period limited by the act to any person" for enforcing his right, "*the right and title of such person to the land shall be extinguished:*" but the statute does not go on to say in whom the right and title shall vest.

When two or more wrong doers are successively in possession of land to which the right and title of the real owner is extinguished, the result of the joint operation of the provisions of this statute, and the rules of the common law with respect to rights accruing from mere possession, appears to be as follows, namely, that the right to such land vests, as soon as the right of the real owner is extinguished, in the party who was in possession at the time when such extinguished right first accrued; and continues in him until the expiration of twenty years after the cesser of his possession, during which period he may consequently maintain ejectment, when it vests in the next possessor, and so on. As thus, *A.* being in possession when the extinguished right of the real owner commenced, remains in possession five years, when he is ousted

(*a*) Ante. p. 28.

(*b*) Doe d. Hardinge v. Cooke, 7 Bing. 346.

by *B.*, who remains in possession ten years, when he is ousted by *C.*, who remains in possession until twenty years have expired from the period when such extinguished right first accrued. For the first five years after the right is extinguished *C.* will have a good defence against an ejectment brought by *B.*, by showing the prior possession of *A.*; but as against *A.* he will have no defence, for he cannot set up the extinguished right of the real owner, or any priority of possession in another, because such possession must have been before the commencement of the twenty years; and during the next ten years *C.* has a good defence as against *A.*, because he has not enforced the right arising from his possession (whatsoever under the provisions of the statute may be the nature of that right) within the statutory period, but has no defence as against *B.*; and after the expiration of such ten years, *C.*'s title is good as against all the world.

If this view of the operation of the statute be correct, the respective rights of *A.* *B.* and *C.* would remain unaltered, although the real owner should regain possession of the land after his right has been extinguished by the operation of the statute.

24. And to these we may add, that AN AWARD, UNDER A SUBMISSION TO ARBITRATION, will give a good title by way of estoppel, on which to maintain this action; for although the award cannot have the operation of conveying the land, there is no reason why the defendant may not conclude himself, by his own agreement, from disputing the title of the lessor of the plaintiff in ejectment. The parties consent that the award of an arbitrator chosen by themselves shall be conclusive, as to the right of the land in controversy between them; and this is sufficient to bind them in the action of ejectment (*a*).

(*a*) *Doe d. Morris v. Rosser*, 3 East, 15.

CHAPTER IV.

Of the Action of Ejectment as between Landlord and Tenant.

IN the preceding Chapter, those cases have been considered in which it is incumbent upon the claimant to prove his title to the disputed premises. It will be now necessary to consider the action with reference to those cases in which such proof is not requisite; that is to say, in which the defendant has obtained possession under some contract or agreement with the claimant, express or implied, and his right to the possession has ceased. The relationship of landlord and tenant exists to some extent in all these cases, and the rights of such parties with regard to this remedy, and the several modes by which tenancies may be determined, will form the subject of the present Chapter.

The power of determining a tenancy is necessarily consequent upon the right of creating one; and the law implies a mutual reservation of such power in all contracts between landlords and tenants, whenever it is not expressly reserved. Whenever such power is expressly reserved, as, for example, in tenancies for terms certain, or until *A. B.* shall attain twenty-one, or so long as the tenant shall perform certain covenants, and the like, the determination of the tenancy is, of course, dependent upon the terms of the reservation; and the tenancy will cease when the term ends, the event happens, or the covenants are broken; but if there be no express reservation, but the party is let into possession as tenant under a general holding, the law creates between the parties a tenancy from year to year, determinable by a notice to quit from either of them.

When tenancies are determined by the efflux of time, or the happening of a particular event, the right of entry in the landlord at once accrues, and he may proceed to recover the premises without notice or demand of possession (*a*). No comments, therefore, are necessary upon this division of the subject, but it will be necessary to enter fully into the principles by which tenancies from year to year are governed, and the rules which have been laid down for the regulation of the rights of re-entry for the breach of covenants and conditions.

Firstly, as to tenancies from year to year.

It has already been observed, that until the reign of King Henry VII., even a tenant, having a lease of lands for a definite period, had not a full and complete remedy when ousted of his possession (*b*). The tenants, who during those times occupied lands without any specific grant, held them by a far more precarious tenure. A general occupation of lands, that is to say, a holding without any certain or determinable estate being limited therein, was then considered as a holding at the will and pleasure of the owner of the land; and the tenant was liable to be ejected, at any moment, by the simple determination of his landlord's will. But the same enlightened policy which secured to lessees for years the complete possession of their terms, soon extended itself also to those general holdings, then called tenancies at will; and in the reign of King Henry VIII. (*c*), we find it holden by the Courts, that a general occupation should be considered to be an occupation from year to year; and that a person so holding should not be ejected from his lands, without a reasonable notice from his landlord to relinquish the possession. It was also at the same time settled, that this reasonable notice should be a notice for

(*a*) *Roe d. Jordan v. Ward*, 1 H. Blk. 97.

(*b*) *Ante*, p. 8.

(*a*) 13 Hen. VIII. 15, (*b*).

half a year, expiring at the end of the tenancy; because otherwise, a notice, reasonable as to duration, might be given, which would, notwithstanding, operate greatly to the prejudice of the tenant, by ejecting him from his lands, immediately before the harvest, or other valuable period of the year: and this rule has remained unaltered to the present day, except where a different time is established, either by express agreement, or immemorial custom (*a*).

A general occupation of land now therefore, as has been already observed, enures as a tenancy from year to year, determinable, and necessarily determinable (*b*), by a notice to quit; and a holding merely at the will of the landlord, according to the ancient meaning of the term, is an estate unknown in modern times (*c*), unless when created by express agreement between the parties (*d*). There is indeed an implied modern tenure denominated a tenancy at will, but it differs materially from the old tenancy so called, and in truth is scarcely distinguishable from a mere permissive occupation of the land, independent of the relationship of landlord and tenant. This kind of tenancy arises when the party is in possession of the premises with the privity (*e*) and consent of the owner, no express tenancy having been created, and no act having been done by the owner impliedly acknowledging such party as his tenant. As where he has been let into possession pending a treaty for a purchase or a lease (*f*), or under a lease or agreement for a lease which is void (*g*), or as

(*a*) *Parker d. Walker v. Constable*, 3 Wils. 25.

(*b*) *Doe d. Warner v. Brown*, 8 East, 165.

(*c*) *Timmins v. Rawlinson*, 3 Burr. 1603—9.

(*d*) *Richardson v. Lengridge*, 4 Taunt. 128.

(*e*) *Doe d. Knight v. Quigley*, 2 Camp. 505; *Right d. Lewis v.*

Beard, 13 East, 210; *Hegan v. Johnson*, 2 Taunt. 148; *Doe d. Leeson v. Sayer*, 3 Camp. 8.

(*f*) *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Doe d. Warner v. Browne*, 8 East, 165; *Doe d. Newby v. Jackson*, 1 B. & C. 448.

(*g*) *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717.

the minister of a dissenting congregation (*a*), or where, having been tenant for a term which has expired, he continues in possession negotiating for a new one (*b*). In all these, and the like cases, it is holden that the party, being lawfully in possession, cannot be ejected until such lawful possession is determined, either by demand of possession, breaking off the treaty, or otherwise (*c*), and the party is called a tenant at will; but in any of these cases if the landlord receive rent whilst the party is so in possession, or do any other act amounting to an acknowledgment of a subsisting tenancy, a tenancy from year to year will be created thereby (*d*).

It is singular that we do not find in the old authorities any decisions relative to notices to quit, although the practice of giving them has been so long established; but during the last century they have become objects of considerable attention to our Courts, and there is now no difficulty in reducing their requisites to a clear and satisfactory system.

In considering the uses and requisites of the notice to quit, our first inquiry will be directed to those particular cases in which implied tenancies from year to year are created, although the direct relationship of landlord and tenant does not exist; we shall then consider by whom, and to whom, the notice should be given; then proceed to the form of the notice, and the particular times required in certain cases for its expiration;

(*a*) Doe d. Nicholl v. M'Keay, 10 B. & C. 721; Doe d. Jones v. Jones, 10 B. & C. 718.

(*b*) Denn d. Brune v. Rawlins, 10 East, 261; Doe d. Foley v. Wilson, 11 East, 56; Doe d. Thomas v. Chamberlayne, 5 Mee. & W. 14.

(*c*) Roe d. Blair v. Street, 4 Nev. & M. 42; Daniels v. Davidson, 16 Vez. Jun. 252; Doe d. Price v.

Price, 9 Bing. 356; Doe d. Bennett v. Turner, 7 M. & W. 226; 9 M. & W. 643; Doe d. Burgess v. Thomson, 1 Nev. & P. 215; Doe d. Rogers v. Pullen, 2 Bing. N. C. 749.

(*d*) Doe d. Rigge v. Bell, 5 T. R. 471; Clayton v. Blakey, 8 T. R. 3; Thunder. d. Weaver v. Belcher, 3 East, 449, 451; Doe d. Warner v. Browne, 8 East, 165.

and lastly point out the means by which the notice may be waived.

It has been already observed that the positions of mortgagor and mortgagee are not exactly defined as far as regards their relation as landlord and tenant (*a*); but it is settled law that the mortgagor is not in the position of a yearly tenant to his mortgagee, and a mortgagee may maintain ejectment against him, after the forfeiture of the mortgage, without any previous notice to quit, or demand of possession (*b*). The under lessees of the mortgagor may also be ejected in like manner, provided they have been let into possession by the mortgagor, subsequently to the mortgage, and without the privity of the mortgagee; and it is immaterial whether they hold as tenants from year to year, or by leases executed after the date of the mortgage. With respect to tenancies created prior to the mortgage, the situation of the mortgagee is of course the same as that of the mortgagor before the mortgage was made (*c*).

If the mortgagor makes a lease subsequent to the mortgage, and the mortgagee consent to receive the lessee as his tenant, he will not thereby confirm the lease, but he cannot afterwards determine the tenancy without a notice to quit (*d*); and where a mortgage contained a singular clause that the mortgagor should pay a certain "*yearly rent*" exceeding the mortgage interest, "so long as he occupied the premises," and that it should be lawful for the mortgagee to use such remedies by distress and sale for the recovery of the *said rent* as landlords have on common demises, *provided that the reservation of such rent should not prejudice the mortgagee's right to enter and evict the mortgagor at any time after default made in payment of*

(*a*) *Ante*, p. 42.

(*b*) *Doe d. Fisher v. Giles*, 5 Bing. 421; S. C. 2 M. & P. 749.

(*c*) *Warne d. Keech v. Hall*, Doug. 21; *Thunder d. Weaver v.*

Belcher, 3 East, 449; *Birch v. Wright*, 1 T. R. 378; *Doe d. Shepard v. Allen*, 3 Taunt. 78.

(*d*) *Doe d. Hughes v. Rising*, 8 C. & P. 566.

the monies received," it was held that this proviso operated so as to prevent the creation of a tenancy from year to year by the payment and receipt of the rent reserved, and even by a distress for the arrears (a).

The assignees of the mortgagee have the like privileges with the mortgagee himself with regard to the mortgagor and his under-tenants; and the right of an assignee to maintain ejectment without a notice to quit, or demand of possession, will not be taken away by a tenancy created prior to the assignment, provided such tenancy commenced subsequently to the date of the mortgage, and continued unacknowledged by the mortgagee (b).

The like principle prevails with respect to claimants under writs of *elegit*; if the judgment debtor be himself in possession, or if the party in possession has been admitted tenant subsequently to the date of the judgment, (whether as a yearly tenant or under a lease) the tenant by *elegit* may maintain ejectment without a notice to quit, or demanding possession; but if the tenant claim under a lease, or tenancy from year to year, prior in point of time to the judgment, the claimant will be barred in the last case until he has determined the tenancy by a regular notice to quit; in the first, until the determination of the lease (c).

When a party has obtained possession of premises belonging to another, and the owner does any act from which a jury may infer that he intends to acknowledge him as his tenant, a tenancy from year to year is created by such act, and the party will be entitled to a regular notice to quit before he can be ejected. Thus, if a landlord suffer his tenant to continue in

(a) Doe d. Garrod v. Olley, 12 Ad. & Ell. 485.

(b) Thunder d. Weaver v. Belcher, 3 East, 449.

(c) Doe d. Da Costa v. Wharton, 8 T. R. 2; Doe d. Putland v. Hilder, 2 B. & A. 782.

possession after the expiration of his lease, and receive rent from him accruing subsequently to the period of such expiration, he becomes thereby his tenant from year to year upon the conditions of the original lease (*a*). So also, if a tenant for life make a lease, void against the remainderman, and the lessee enter, and then the tenant for life die, if the remainderman receive rent from such lessee, accruing subsequently to the death of the tenant for life, such receipt of rent, although it will not amount to a confirmation of the lease, will be sufficient (unless from the inadequacy of the rent to the value of the premises, the jury should presume otherwise) (*b*) to establish a tenancy from year to year, upon the terms of it, between the remainderman and the lessee: and it will be no answer for the remainderman, that he was ignorant of his title when he received the rent, for it is more reasonable that the remainderman, who ought to have looked into his title, should be bound by his own act, than that the lessee should be prejudiced by his ignorance (*c*). In like manner, when a party is let into possession under a void lease, payment and receipt of rent will not establish the lease, but it will create a tenancy from year to year, regulated by its covenants and conditions (*d*). The same principle also holds if the party come into possession under an invalid agreement: as where the party held under an agreement that his landlord should not turn him out so long as the rent was duly paid, and he did not sell any article injurious to his landlord in his business, which agreement was invalid, inasmuch as it would (if the tenant complied with its terms) operate as an estate for life, which cannot be created by such an instrument, yet the tenant having been let into possession,

(*a*) *Bishop v. Howard*, 2 B. & C. 100. 7 T. R. 83.

(*b*) *Doe d. Brune v. Prideaux*, 10 East, 158; *Denn d. Brune v. Rawlins*, 10 East, 261. (*d*) *Doe d. Rigge v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3; *Doe d. Higgs v. Terry*, 4 Ad. & Ell. 274; *Doe d. Hobbs v. Cockell*;

(*c*) *Doe d. Jordan v. Ward*, 1 H. Black. 97; *Doe d. Martin v. Watts*, Ibid. 478; *Doe d. Thomson v. Amey*, 12 Ad. & Ell. 476.

and rent having been paid and received, a tenancy from year to year was created (a).

The same rule prevails when a party is let into possession under a valid agreement for a future lease. As no interest in the land passes under such an agreement, no tenancy is created thereby; but the party being let into possession, and rent being paid and received, he becomes, as in the cases already mentioned, a tenant from year to year, according to its stipulations (b).

Serious difficulties have continually presented themselves in

(a) Doe d. Warner v. Browne, 8 East, 165.

(b) Doe d. Thomson v. Amey, 12 Ad. & El. 476. The unsettled state of the principles and uses of the action of ejectment in the time of Lord Mansfield, is well illustrated by the decisions in the cases of Weakley d. Yea v. Bucknell, Cowp. 473 (Mich. Term, 17 Geo. III.), and Goodtitle d. Estwick v. Way, 1 T. R. 735, (Easter Term, 27 Geo. III.). In the former case, an agreement for a lease was held to be tantamount to a lease; and the party making the agreement was estopped from maintaining an ejectment against the other party, although he had given him a regular notice to quit, because "*if the Court were to say the ejectment ought to prevail, it would be merely for the sake of giving the Court of Chancery an opportunity to undo all again.*" In the latter case a similar agreement was held to form no defence to an ejectment, brought by a party to whom the party making the agreement had granted a term in the premises to satisfy creditors,

subsequently to the date of the agreement, although no notice to quit had been given, and the party had paid rent under the agreement; because the conveyance being made by the lessor to a trustee for the benefit of creditors "*was not a mere voluntary conveyance,*" and therefore the lessor could not be considered as a trustee for the defendant, and as such restrained "*from bringing ejectment against his own CESTUI QUE TRUST;*" and the agreement for the lease "*gave the defendant only an equitable title, which cannot be set up in a Court of law against the plaintiff who has a legal title.*" Upon the sound principles by which the action is now regulated, it is evident that these two decisions should have been reversed. In both cases the agreement for the lease, and the receipt of rent under it would have been held to create tenancies from year to year, which would have been determined in the first case by the notice to quit, and would have continued in the latter, for want of such notice.

construing agreements of this character, from doubts arising out of the wording of each particular instrument, whether taking the whole of it together it was intended by the parties to operate as a present demise, or only as an agreement for a future one, and the decisions upon these points are numerous and perplexing; but these nice distinctions are put an end to by the recent stat. 8 & 9 Vict. c. 106, s. 3, which enacts, that every lease required by law to be in writing, made after October 1st, 1845, shall be void at law, unless made by deed.

Where a party enters under an agreement of this nature, and continues in possession during the period for which by the agreement the lease was to be granted, his tenancy ceases at the expiration of that period without any notice to quit, as it would have done if a lease had been executed (*a*).

In all the cases above enumerated, the acknowledgment of the tenancy was by the payment and receipt of rent, which is indeed the ordinary evidence in cases of this nature. But the intention to create such a tenancy, may also be inferred from other circumstances. Thus, where under a void lease, a money rent was reserved, and there was also a further reservation that the tenant was to carry three cart-loads of culm annually to his landlord's dwelling-house, and he did so, and the landlord received the same, it was held, that he had thereby acknowledged the lessee as tenant from year to year (*b*). So where lands descended to an infant, and an ejectment was brought on his demise, and compromised upon certain terms, one of which was, that the tenant should attorn to the infant, it was ruled by Lord Kenyon, C. J. at *Nisi Prius*, upon a second ejectment being brought by the infant, when he attained his full age, that although he was no party to the agreement, nor had confirmed it, nor received rent since he came of age, yet that such

(*a*) Doe d. Tilt v. Stratton, 4 Bing. 446.

(*b*) Doe d. Tucker v. Morse, 1 B. & Ad. 365.

agreement, having been entered into, without fraud or collusion, after an ejectment brought at his suit, had, by his acquiescence therein, established the defendant's title as against himself, and created a new tenancy, which could only be determined by a notice to quit (*a*). So also where a *feme covert* lived many years separated from her husband, and during that time received to her separate use the rents of certain lands, which came to her by devise after separation, it was presumed, that she received the rents by her husband's authority, and held, that a notice to quit must be given by him before he could maintain ejectment (*b*).

Where *A.* granted an annuity to *B.* out of certain lands with the usual power of distress and entry if the annuity should be in arrear, and *A.* afterwards granted a lease for years to *C.*, and the annuity fell into arrear, and *B.* distrained upon *C.*, who thereupon signed an agreement "to attorn and become tenant to *B.*," and paid him rent; it was held, that this created a tenancy from year to year between *B.* and *C.*, determinable on the payment of the arrears of the annuity, upon which *C.*'s lease for years would revive (*c*).

It has also been held, that where a rector had suffered persons who were in possession as tenants prior to his incumbency, to continue in quiet and undisturbed possession for eight months after his institution, he must be presumed to have assented to the continuance of their tenancy under the terms of their previous holding, and therefore unable to eject them without a notice to quit (*d*); and although this is the only case in which a mere permission by the owner to occupy premises, without some positive act of acknowledgment, has been held sufficient

(*a*) Doe d. Miller v. Noden, 2 Ad. & Ell. 675; 1 Nev. & P. 650. Esp. 528.

(*b*) Doe d. Leicester v. Biggs, 1 6 B. & C. 126; Doe d. Kerby v. Taunt. 367. Carter, 1 R. & M. 237.

(*c*) Doe d. Chawner v. Bolter, 9

(*d*) Doe d. Cates v. Somerville,

to create a tenancy requiring a regular notice to quit, the principle seems applicable to all cases where the occupant has been tenant to a previous owner, and his tenancy has expired on the determination of his landlord's estate.

But where a party has put another into possession with a view to a future tenancy or purchase, or under circumstances of a similar nature; although he may have done no act acknowledging a regular tenancy, he cannot afterwards eject him without a demand of possession, unless some wrongful act has been done by such party determining his lawful possession.

Thus, where a party was let into possession, under an agreement for the purchase of the land, and had possession formally given to him, and paid part of the purchase-money, and there was no default on his part (*a*), a demand of possession was held necessary (*b*). So likewise where it was agreed that *A.* should sell to *B.* certain premises if it turned out that he had a title to them, and that *B.* should have immediate possession, *A.* was not permitted to maintain ejectment against *B.* without a demand of possession, although the object of the action was to try the title to the premises (*c*). So likewise where a tenant, whose lease had expired, continued in possession, pending a treaty for a further lease, although no tenancy from year to year was created by such possession and negotiation, the landlord was thereby precluded from recovering in ejectment, upon a demise anterior to the determination of the treaty (*d*). So also when a party is admitted into possession under an invalid lease or agreement, the landlord must demand possession, or in some other manner determine the will, before

(*a*) *Doe d. Parker v. Boulton*, 6 M. & S. 148—50.

(*b*) *Right d. Lewis v. Beard*, 13 East, 210.

(*c*) *Doe d. Newby v. Jackson*, 1 B. & C. 448.

(*d*) *Doe d. Hollingsworth v. Stennet*, 2 Esp. 716.

he can maintain ejectment, although he has not acknowledged the party as his tenant (*a*).

But where the vendor of a term, after payment of part of the purchase-money, let the purchaser into possession upon an agreement, that he (the purchaser) should have possession of the premises until a given day, paying the reserved rent in the meanwhile, and that if he should not pay the residue of the purchase-money on that day, he should forfeit the instalments already paid, and not be entitled to an assignment of the lease; and the purchaser failed to complete the purchase at the appointed day; it was ruled that an ejectment might be maintained without even a demand of possession, the purchaser having by his own act determined his interest in the premises (*b*). And where a man, having obtained possession of a house without the landlord's privity, afterwards entered into a negociation with him for a lease, which failed, the same rule of construction seems to have prevailed (*c*). So also where upon an agreement for a sale to be completed by a certain day, the intended purchaser agreed with *A.* to let the premises to him to commence from that day, and *A.* was let into possession prior to that day by the permission of the intended seller, and the party failed to complete his purchase, *A.* was held not entitled to a demand of possession before ejectment brought, his possession being only the possession of that party by anticipation (*d*).

As the implied tenancies from year to year, which have here been treated of, depend wholly upon the presumption, that it

(*a*) *Goodtitle d. Herbert v. Gal-
loway*, 4 T. R. 680; *Clayton v.
Blakey*, 8 T. R. 3; *Thunder d.
Weaver v. Belcher*, 3 East, 449,
451; *Doe d. Warner v. Browne*,
8 East, 165; *Hegan v. Johnson*,
2 Taunt. 148.

(*b*) *Doe d. Leeson v. Sayer*, 3
Camp. 8; *Doe d. Moore v. Law-
der*, 1 Stark. 308.

(*c*) *Doe d. Knight v. Quigley*, 2
Camp. 505.

(*d*) *Doe d. Parker v. Boulton*, 6
M. & S. 148.

was the intention of the parties to create them, evidence may always be received to rebut such presumption, and show their real meaning. Thus, where a remainderman, on the death of the tenant for life, gave notice to the tenant in possession under a lease, granted by the tenant for life, but void against the remainderman, to quit at the end of six months, and subsequently to the giving of the notice, but before its expiration, received a quarter's rent, accruing after the death of the tenant for life, it was ruled by Blackstone, J. that the previous notice to quit rebutted the presumption of a tenancy from year to year, raised by the acceptance of the rent (*a*). So also where the rent is not paid and received, as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created. The payment of a customary rent for copyhold premises, has been held to be a payment of this nature; and, if the tenant hold such premises by a title or tenure, which is not supported by the custom of the manor, the receipt of the quit-rent from him by the lord will not create a tenancy from year to year (*b*).

Upon the same principle, where a tenant in tail received an ancient rent, which was but trifling when compared with the real value of the premises, and which had been reserved under a void lease granted by the tenant for life under a power, upon a special case reserved for the opinion of the Court of King's Bench, they intimated that a jury should be strongly advised not to imply a tenancy from year to year from such payment and receipt (*c*), although it would amount to such an acknowledgment of a tenancy at will, as would require a demand of possession before ejectment could be maintained (*d*).

(*a*) Sykes d. Murgatoyd v. —, cited in Right d. Fowler v. Darby, 1 T. R. 161.

(*b*) Right d. Dean of Wells v. Bawden, 3 East, 260.

(*c*) Roe d. Brune v. Prideaux, 10 East, 158.

(*d*) Denn d. Brune v. Rawlins, 10 East, 261.

If the tenant set his landlord at defiance, and do any act disclaiming to hold of him as tenant, as for instance, if he attorn to some other person, no notice to quit will be necessary; for in such case the landlord may treat him as a trespasser (*a*). A reply of a tenant to a demand for rent "you are not my landlord," accompanied by a refusal to give up possession, has been held to amount to a disclaimer (*b*). So also to a similar demand by an agent "my connection with J. C. as tenant has ceased for many years" has been held sufficient evidence of an *antecedent* disclaimer (*c*); and where the legal estate was in trustees, and the tenant had paid rent to the *cestui que trust*, who had given notice to quit, on the receipt of which notice the tenant had said, "he did not think she would turn him out of possession as she had promised he should continue on as tenant from year to year," the Court held, that assuming the defendant to be tenant to the trustees, there was a sufficient disclaimer to entitle them to recover without notice, and that if he was tenant to the *cestui que trust* the notice was sufficient (*d*). But a refusal to pay rent to a devisee under a contested will, accompanied with a declaration that he (the tenant) was ready to pay the rent to any person who was entitled to receive it, was not a disavowal sufficient to dispense with the necessity of a regular notice (*e*).

This species of disclaimer is however limited to tenancies from year to year, a tenant for a definite number of years does not forfeit his term, by wholly refusing to pay rent, and claiming the fee as his own. Tenancies of this character can only be determined by acts *in pais* or matters of record (*f*). But when a tenant, after deserting the premises, delivered up the possession of them with the lease to a party, who claimed

(*a*) B. N. P. 96.

(*b*) Doe d. Bennett *v.* Long, 9 C. & P. 773.

(*c*) Doe d. Grubb *v.* Grubb, 10 B. & C. 816.

(*d*) Doe d. Davies *v.* Evans, 9 M. & W. 48.

(*e*) Doe d. Williams *v.* Pasquali, Peake's R. 196; *vide* Doe d. Calvert *v.* Frowd, 4 Bing. 557; S. C. 1 M. & P. 480.

(*f*) Com. Dig. tit. Forf. A. 5; Doe d. Graves *v.* Wells, 10 Ad. & Ell. 427.

by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold *bond fide* under the lease, the term was held to be forfeited by the act of betraying possession (a).

A disclaimer may be waived by act of the landlord acknowledging the party as his tenant, as for example, by distraining for rent (b).

When a tenant from year to year dies, his interest in the land vests in his personal representative, who will continue to hold the premises upon the same terms as the original tenant, and be entitled to the same notice to quit (c). If, however, by the terms of the agreement, no interest vests in the representatives, no notice to quit will be necessary. Thus where *A.* agreed to demise a house to *B.*, during the joint lives of *A.* and *B.*, and *B.* entered in pursuance of the agreement, and before any lease was executed, died, after which *B.*'s executor took possession of the house; it was held that *A.* might maintain ejectment against the executor without notice to quit, because the death of *B.* determined his interest, and consequently no interest vested in the executor. The Court were also of opinion that the case would have been the same if the lease had been executed (d).

In like manner the situation of a tenant from year to year remains unaltered, notwithstanding the death of the landlord, and he will be entitled to his regular notice to quit, whether the lands descend to the heir (although such heir be a minor,) (e) or pass to the personal representative, or devisee, of the deceased.

(a) *Doe d. Ellerbrock v. Flynn*, 4 stable, 3 Wils. 25.
Tyrr. 619.

(b) *Doe d. David v. Williams*, 6 East, 530.
7 C. & R. 322.

(c) *Doe d. Shore v. Porter*, 3 T. 2 T.R. 159.
R. 13; *Parker d. Walker v. Con-*

(d) *Doe d. Bromfield v. Smith*,

6 East, 530.

(e) *Maddon d. Baker v. White*,

2 T.R. 159.

We are next to consider the persons by whom, and to whom, the notice to quit is to be given.

The notice to quit must be given by the person interested in the premises, or his authorized agent; and such agent must be clothed with his power to give the notice, at the time when the notice is given; a subsequent assent on the part of the landlord not being sufficient to establish by relation a notice, given in the first instance without his authority. And this principle is founded in reason and good sense, for as the tenant is to act upon the notice at the time it is given to him, it ought to be such an one as he may act upon with security; and if an authority by relation were sufficient, the situation of the tenant must remain doubtful, until the ratification or disavowal of the principal, and he would thereby sustain a manifest injustice.

When also two or more persons are interested in the premises, a notice to quit given by one, on behalf of himself and co-tenants, will be valid only as far as his own share is concerned, unless he was acting at the time under the authority of the other parties mentioned in the notice. But this rule does not hold when the parties are interested as joint tenants; because of the rule of law, that every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him, and it must be predicated that the determination of the tenancy by such notice is for the benefit of the estate. And where several tenants in common are interested, as many of them as give notices may recover their respective shares, although the others do not join, unless indeed by the conditions of the tenancy, it is rendered necessary for all the parties to concur in the notice, in which case a notice given by some of the parties, without the junction or authority of their companions, will be altogether invalid (*a*).

(*a*) Right d. *Fisher v. Cuthell*, Goldwin, 2 Q. B. R. 142; Doe d. 5 East, 491; Doe d. *Lyster v. Rhodes v. Robinson*, 3 Bing. N. C.

Where *A.* and *B.*, two tenants in common, had agreed to divide their estate, and that *Blackacre* should belong to *A.*; and the occupier of *Blackacre* afterwards, and with knowledge of this agreement, paid his whole rent to *A.*, and afterwards received from him a notice to quit, such notice was held sufficient for both moieties, although the deed of partition was not signed, because the tenant, by payment of rent to *B.* for the whole premises, had estopped himself from disputing his title to them (*a*).

Where two or more persons are interested as joint tenants, and the notice to quit is given by an agent, the authority of one of the joint tenants to such agent will bind his companions, and make the notice valid against all; but if the persons be interested as parceners or tenants in common, the notice will be available only for such portions of the land, as the parties who have given authority to the agent before he delivered the notice shall be entitled to (*b*).

677; *Doe d. Mann v. Walters*, 10 B. & C. 626; *Doe d. Whayman v. Chaplin*, 3 Taunt. 120; *Doe d. Green v. Baker*, 8 Taunt. 241; *Alford v. Vickery*, 1 Car. & M. 280.

(*a*) *Doe d. Pritchett v. Mitchell*, 1 B. & B. 11; *S. C.* 3 B. Moore, 229.

(*b*) *Doe d. Aislin v. Somerset*, 1 B. & Ad. 137; *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

The marginal note of the case of *Goodtitle d. King v. Woodward*, 3 B. & A. 689, is as follows: "To entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent, it is sufficient if his authority be sub-

sequently recognised; and therefore where such notice was given by an agent under a written authority, which at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all the others: Held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient." To the last edition of this Treatise the following note was appended with respect to this case. "Notwithstanding the printed report of the case of *Goodtitle d. King v. Woodward*, 3 B. & A. 689, I have not altered the principle laid down in the former editions of this work; by that, an agent must be clothed with authority to give a notice to

An agent to receive rents and let, has authority to determine a tenancy (a).

quit at the time of giving the notice, in order to render it valid. The facts of that case were shortly as follows:—A. B. C. and D. were joint tenants, E. gave the tenant in possession a written notice to quit purporting to be given as the agent, and on the part of all the joint tenants; and at the time of giving such notice E. had a written authority so to do from A. and B., which authority was subsequently signed by C. and D. According to a note taken by myself of the judgment of the Court, the principle upon which the notice was held sufficient was, “that a notice to quit given by one joint tenant was binding upon all, because otherwise the lessee would become a joint tenant with the party giving him notice, by which he would be subject to great inconvenience, and the estate of the co-joint tenants would be prejudiced; and, therefore, the notice must be taken to be an act beneficial to the estate, and consequently binding upon all the joint tenants;” and not as stated in the printed report, that “a notice given by an agent is sufficient, if his authority be subsequently recognised.” The report is also I believe incorrect in stating, “that to entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is received;” the reverse of this proposition was according to my note maintained, viz. “that a notice signed by one joint tenant was

binding upon all,” and indeed such must have been the decision if I have taken a correct view of the principle of the judgment. Without inquiring into the soundness of that principle, or whether it would not have been wiser to have placed joint tenants, parceners, and tenants in common, on the same footing with respect to notices to quit, there can be no doubt it is the only principle upon which that judgment can be supported with good faith to the tenant; because if after the delivery of the notice an option remained to the parties who had not then signed the authority to confirm or disallow it, (as assumed in the printed report), the tenant had not “such a notice as he could act upon with certainty at the time it was given,” to which all the authorities say he is entitled; but such certainty commenced only from the time of the recognition of the authority of the agent by those parties, which might have been only the day before the notice expired. And as an option to recognise includes of necessity a right to disallow, how can a tenant possibly regulate his conduct as to the management of his farm, &c. if it may be doubtful until the very day on which his notice expires, whether he will be permitted to go, or compelled to stay?”

The more recent decisions have confirmed the correctness of this view of the case.

(a) Doe d. Lord Manners v. Mizem, 2 M. & R. 56.

The steward of a corporation may give a notice to quit, without a power under the corporation seal for so doing; and if the corporation afterwards bring an ejectment upon such notice, it will not be necessary to give any other evidence of his authority, than that he is steward; for the corporation, by bringing the ejectment, shew that they authorized and adopt the act of their officer (a).

A receiver appointed by the Court of Chancery, with a power to let the lands, is an agent sufficiently authorized to give a notice to quit; for if he have an authority to let, he must be taken to have a power of determining the letting, as he must determine for how long he will let (b).

Where a lease contained a proviso, that if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, *his executors, or administrators*, so to do upon twelve months' notice to the other of them, *his heirs, executors, or administrators*, it was considered that the words *executors, or administrators*, were put for *representatives in general*, and that a notice might be given by *an assignee* of either party, or by *the heir, or devisee*, as well as by the parties themselves, their executors, or administrators; because, otherwise, in case of an assignment or devise, the right of determining the term would be taken from the persons interested in it, and given to a mere stranger, having no interest therein (c). But, where the demise was for twenty-one years, if both parties should so long live, but if either should die before the end of the term, then the heirs and executors, &c., *of the party so dying*, might determine the lease by giving twelve months' notice to quit, it was holden,

(a) *Roe d. Dean of Rochester v. East*, 57, 61.
Pierce, 2 Campb. 96.

(b) *Wilkinson v. Colley, Burr.* 12 East, 464.
 2694; *Doe d. Marsack v. Read*, 12

(c) *Roe d. Bamford, v. Hayley*,

that this power extended only to the representative of the party dying, and that the lease could not be determined by a notice to quit given by the lessor, after the lessee's death, to his representative (a).

When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. The service should invariably be upon the tenant of the party serving the notice, notwithstanding a part, or even the whole of the premises, may have been under-let by him. And in a case where the service was upon a relation of the under-tenant *upon the premises*, Lord Ellenborough, C. J. ruled the service to be insufficient, although the notice was *addressed* to the original tenant (b). The original tenant is also liable to an ejectment, at the expiration of the notice, for the lands in the possession of his under-tenants, although he may, on his part, have given proper notices to them, and delivered up such parts of the premises as were under his own control (c).

Where a tenant from year to year had under-let part of the premises, and then gave up to his landlord the part remaining in his own possession, not having received from him a notice to quit, or surrendering such part in the name of the whole, it was held that a notice to quit, from the original landlord to the sub-lessee, for the part so under-let, was irregular; and that the notice should be given to the sub-lessee, by his immediate landlord, or by the original landlord to the sub-lessee.

When the premises are in the possession of two or more, as joint tenants, or tenants in common, a written notice to quit,

(a) Legg d. Scott v. Benion, Willes, 44.

(b) Doe d. Mitchell v. Levi, M. T. 1811, MS.

(c) Roe v. Wiggs, 2 N. R. 330; Pleasant d. Hayton v. Benson, 14 East, 234.

addressed to all, and served upon one only, will be a good notice (*a*); so also a parol notice, given to one co-tenant only, will bind his fellow (*b*).

When a corporation aggregate is the tenant, the notice should be addressed to the corporation, and served upon its officers, and a notice addressed to the officers will not be sufficient (*c*).

In a case where *A.* appeared and entered into a consent rule for part of the premises as tenant, and *B.* appeared and entered into a separate consent rule for the whole premises, that is to say, as landlord for the part in the possession of *A.* and as tenant for the residue, and it appeared that *B.* had been let into possession by *C.* (who had come into possession under a contract of sale which had not been carried into execution) and had underlet part of the premises to *A.*, and the lessor failed to prove service of a notice to quit on *C.* or *A.* but proved a service on *B.*, the Court held that the verdict was rightly entered for the plaintiff for all the premises; and it is doubtful, from the words of the judgment, whether the Court did not consider the plaintiff entitled to take out execution for the premises in the possession of *A.*, as well as those in the possession of *D.* (*d*).

(*a*) Doe d. Lord Bradford, *v.* Watkins, 7 East, 551.

(*b*) Doe d. Lord Macartney *v.* Crick, 5 Esp. 196.

(*c*) Doe d. Lord Carlisle *v.* Woodman, 8 East, 228.

(*d*) Roe d. Blair *v.* Street, 2 Ad. & Ell. 332. The report of this case is very unsatisfactory; and may lead to conclusions respecting notices to quit not warranted by the general rules by which they are governed. I conceive that the re-

lation of landlord and tenant had never been constituted between the lessor and *C.* (*vide ante*, p. 83); and consequently that no notice to quit was necessary to be given either to *C.*, or to *B.*, whom *C.* had no right to admit, or to *A.* to whom *B.* (being so admitted without right) had underlet; and that a simple determination of the tenancy at will by demand of possession was all that was required, and that the Court held the will to be suffi-

When a tenant from year to year died, and a notice was served upon the widow, who remained in possession, and no proof was given that there was any personal representative of the testator, the notice was held sufficient (*a*).

With respect to the mode of serving the notice, it is in all cases advisable, if possible, to deliver it to the tenant personally; but if personal service cannot be effected, the service will be sufficient if the notice be left with the wife or servant of the tenant at his usual place of residence, whether upon the demised premises, or elsewhere, and its nature and contents explained at the time (*b*), or in whatever other manner it may be served, if it can be shown that it came to the tenant's hands, before the six months previous to the expiration of his year of holding (*c*). But a mere leaving of the notice at the tenant's house, without proof that it was delivered to some member of the household, will not be a sufficient service. (*d*).

Next of the form of the notice (*e*).

When the landlord intends to enforce his claim to double value if the tenant holds over (*f*), it is necessary that the notice to quit should be in writing; but for the purposes of an ejectment a parol notice is sufficient, unless the notice is required to be in writing by express agreement between the parties (*g*).

ciently determined by demand of possession upon the *actual* occupier *B.*; and as there was no privity between *A.* and *C.* (*B.* having been let into the *whole* of the premises by *C.*, and *A.* having taken part as tenant to *B.*) the notice to *B.* determined the will as to the whole premises, and gave the lessor the right to recover the *whole*.

(*a*) *Doe d. Mears v. Perrott*, 4 C. & P. 230.

(*b*) *Jones d. Griffith v. Marsh*, 4 T. R. 464; *Doe d. Lord Bradford*,

v. Watkins, 7 East, 553; *Doe d. Neville v. Dunbar*, 1 M. & M. 10; *Smith v. Clarke*, 9 Dow. P. C. 202.

(*c*) *Alford v. Vickery*, 1 Car. & M. 280.

(*d*) *Doe d. Buross v. Lucas*, 5 Esp. 153.

(*e*) Appendix, Nos. 1, 2, 3.

(*f*) 4 Geo. II. c. 28, s. 1.

(*g*) *Legg d. Scott v. Benion*, Willes, 43; *Timmins v. Rowlison*, 1 Blk. 533; *Doe d. Lord Macartney v. Crick*, 5 Esp. 196; *Roe d.*

It is however nevertheless the general practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes, and renders the evidence certain and correct. It is customary also to address the notice to the tenant in possession; and it is perhaps most prudent to adhere to this form, though if proof can be given that the notice was served personally upon him, it is thereby rendered unnecessary (*a*). And where a notice was addressed to the tenant by a wrong Christian name, and the tenant did not return the notice, or object to it, and there was no tenant of the name mentioned in the notice, it was ruled at *Nisi Prius* to be sufficient (*b*).

A subscribing witness to a notice to quit is unnecessary; and it is prudent not to have one, as it may occasion difficulties in the proof of the service, and cannot be of the slightest advantage to the landlord (*c*).

Care should be taken that the words of a notice are clear and decisive, without ambiguity, or giving an alternative to the tenant; for although the Courts will reluctantly listen to objections of this nature, yet if the notice be really ambiguous, or optional, it will be sufficient to render it ineffectual, as far at least as the action of ejectment is concerned (*d*).

The notice, however, will not be invalid, unless it contain a real and *bond fide* option, and not merely an apparent one; for if it appear clearly, from the words of the notice, that the landlord had no other end in view than that of turning out the tenant, it will be deemed a notice sufficient to found an eject-

Dean of Rochester *v.* Pierce, 2
Camp. 96.

(*a*) Doe d. Matthewson *v.*
Wrightman, 4 Esp. 5.

(*b*) Doe *v.* Spiller, 6 Esp. 70.

(*c*) Doe d. Sykes *v.* Duratord, 2
M. & S. 52.

(*d*) Roberts *v.* Hayward, 3 C. &
P. 432.

ment upon, notwithstanding an apparent alternative. Thus the words, "I desire you to quit the possession at Lady-day next of the premises, &c. in your possession, or *I shall insist upon double rent*," have been held to contain no alternative; because the landlord did not mean to offer a new bargain thereby, but only added the latter words as an emphatical way of enforcing the notice, and showing the tenant the legal consequences of his holding over. It was contended for the tenant, that this could not be the construction of the notice, because the statute of 4 Geo. II. c. 28, does not give double the *rent*, but double the *value*, on holding over; but Lord Mansfield, C. J., was of opinion, that the notice, notwithstanding this variance, clearly referred to the statute. It seems, however, that if the words had been "*or else that you agree to pay double rent*," the notice would have been an alternative one (*a*). So also, a notice to quit at the end of the current year "on failure whereof I shall require you to pay me double former rent, or value for so long as you do detain possession," has been held to be an unqualified notice, and not giving an option to the tenant (*b*).

Where the notice was to quit "on the 25th day of March, or 6th day of April next ensuing," (*c*) and was delivered before new Michaelmas-day, it was held to be a good notice; as being intended to meet an holding commencing either at new, or old Lady-day, and not to give an alternative (*d*).

Upon the same principle, the Court will not invalidate a notice, on account of an ambiguity in the wording of it, provided the intention of the notice be sufficiently certain. Thus

(*a*) Doe d. Matthews v. Jackson, Doug. 175.

(*b*) Doe d. Lyster v. Goldwin, 2 Q. B. R. 142.

(*c*) In the printed report, this date is stated to be the *eighth* day

of April, which, from the reasoning in the case, cannot be correct. See also Doe d. Spicer v. Lea, 11 East, 312.

(*d*) Doe d. Matthewson v Wrightman, 4 Esp. 5.

an impossible year has been rejected. The notice was given at Michaelmas, 1795, to quit at Lady-day *which will be* in 1795, and was accompanied, at the time of the delivery to the tenant with a declaration, that as he would not agree to the terms proposed for a new lease he must quit *next* Lady-day, and under these circumstances the notice was considered to be sufficiently certain (a); the Court also seemed to be of opinion, that the notice would have been good without the accompanying declaration, the words "*which will be*," manifestly referring to the then next Lady-day. In like manner where there was a misdescription of the premises in the notice, which could lead to no mistake, the house being described therein as the *Watermans' Arms*, instead of the *Bricklayers' Arms*, no sign called the *Watermans' Arms* being in the parish, the notice was deemed a valid one (b).

So likewise where a farm was leased for twenty-one years at a certain rent, consisting, as described in the lease, of *the Town Barton*, at one portion of the rent, and *the Shippin Barton* at the residue, with a power reserved to determine the lease at the end of fourteen years on giving a certain notice; it was held that a notice to quit "*Town Barton &c. agreeably to the terms of the covenant between us, &c.*" was sufficient, because the landlord must have intended to give such a notice as the lease reserved to him the liberty of giving, and not a void notice to quit a part only, and so the notice must have been understood by the tenant (c).

So also, notice to a yearly tenant to quit the farm, &c. "situate at *D.* in the county of York, which you now hold under me," the premises not being situated at *D.* but at *H.* an adjoining parish, was held not to be a material variance, the

(a) Doe d. Duke of Bedford v. 185.

Kightly, 7 T. R. 63.

(c) Doe d. Rodd v. Archer, 14

(b) Doe d. Cox v. —, 4 Esp. East, 245.

tenant not having shown that he held more than one farm, or that he was misled by the notice (a).

When a notice is given to quit at Michaelmas, or Lady-day, generally, it will not be deemed an ambiguous notice, but considered *prima facie*, as expiring at *new* Michaelmas, or *new* Lady-day, open however to explanation, that *old* Michaelmas, or *old* Lady-day, was intended. And if it appear, that the customary holdings where the lands lie, are from old Michaelmas, or Lady-day, or even that in point of fact the tenant entered at old Michaelmas, or Lady-day, although no such custom exist, such a notice will be binding upon him (b).

The notice must include all the premises held under the same demise, for a landlord cannot determine the tenancy as to part of the things demised, and continue it as to the residue (c). But where the demise was of land and tithes, and the notice was to quit possession of "all that messuage, tenement, or dwelling-house, farm-lands, and premises, with the appurtenances which you rent of me," it was ruled at *Nisi Prius* that this notice was sufficient to include the tithes; for the tithes being held along with the farm, the notice must have been understood by both parties to apply to both (d).

Fourthly, Of the time when the notice should expire.

Before, however, we enter upon this subject, it may be useful to observe, that demises, which create tenancies from year to year only are sometimes worded so as to convey to the tenant an indefeasible interest for a certain period beyond the first year though afterwards liable to be determined by a notice to quit.

(a) Doe d. Armstrong v. Wilkinson, 12 Ad. & Ell. 743.

588; Doe d. Willis v. Perrin, 9 C. & P. 467.

(b) Furley d. Mayor of Canterbury v. Wood, 1 Esp. 197; Doe d. Hinde v. Vioce, 2 Campb. 256; Doe d. Hall v. Benson, 4 B. & A.

(c) Doe d. Rodd v. Archer, 14 East, 245.

(d) Doe d. Morgan v. Church, 3 Campb. 71.

Thus, a demise, "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, and not determinable by a notice to quit at the expiration of the first year (*a*). So also a demise "for one year and so on from year to year (*b*);" but a different interpretation was given by Lord Ellenborough at *Nisi Prius* to a demise "for twelve months' certain, and six months' notice afterwards;" and it was ruled by him that such a demise might be determined by a notice expiring at the end of the first year, on the ground that the word *certain* applied to the first twelvemonths, which shewed that every thing *afterwards* was *uncertain*, and depended upon the notice (*c*); and this reasoning has been subsequently confirmed by the Court of Queen's Bench (*d*).

Where the demise was to hold for three, six, or nine years generally, without any stipulation as to the manner in which, or the party by whom, the tenancy might be determined at the end of the third, or sixth year, the tenancy was held to be determinable, at the two earlier periods, at the will of the tenant only, and by a regular notice to quit; and that, as against the landlord, the demise operated as an indefeasible one for nine years (*e*).

If the produce of the demised lands require two years to come to perfection, as if it be licorice, madder, &c. a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year (*f*). And it was

(*a*) *Denn d. Jacklin v. Cartright*, Camp. 573.
4 East, 31.

(*b*) *Birch v. Wright*, 1 T. R. Ad. & El. 658.

378, 80, and the cases there cited;
Johnson v. Huddleston, 4 B. & C. 399.
922.

(*c*) *Thompson v. Maberley*, 2

(*d*) *Doe d. Chadborn v. Green*, 9

(*e*) *Denn v. Spurrier*, 3 B. & P.

(*f*) *Roe v. Lees*, Black. 1171.

observed by De Grey, C. J. in his judgment, that it might deserve to be considered whether, if required by the nature of the soil, or the course of husbandry, a general holding will not always enure as a tenancy for such period, as may be necessary to carry the land through its regular course of cultivation, instead of as a tenancy from year to year; but this doctrine seems very doubtful.

It has before been stated generally, that, by the common law, the notice necessary to be given to a tenant, is a notice for *half-a-year*, expiring at the end of the current year of his tenancy; and that a notice, expiring at any other period, will not be sufficient(*a*). This notice is frequently spoken of in the books, as *a six months' notice*; and the distinction seems to be, that when the tenancy expires at any of the usual feasts, as Michaelmas, Christmas, Lady-day, or Midsummer the notice must be given prior to the corresponding feast happening in the middle of the year of the tenancy(*b*); whilst if it expire at any other period of the year, the notice must be given six calendar months previous to such expiration.

The notice, when a tenancy commences at any of the usual feasts, may be given to quit at the end of half-a-year, or of six months from the date of the corresponding feast in the middle of the year, without stating the day when the tenant is to quit, although the intermediate time be not exactly half-a-year or six months, from feast to feast being the usual half-yearly computation. And indeed, in a case where the notice was to

(*a*) *Ante*, 75.

(*b*) In a report of a MS. case in Esp. N. P. 460, it is said, that a notice given on the 30th of September, being the day after Michaelmas-day, to quit at Lady-day following, was ruled by Heath, J. to be a sufficient notice. Some particular circumstances, not no-

ticed by the reporter, must, it is conceived, have occasioned Mr. J. Heath's decision, since the principle laid down in the report is in opposition to every authority upon the subject. Probably the tenant entered at old Lady-day. *Vide* Right v. Darby, 1 T. R. 159, *et ante*, 98.

quit "on or about the expiration of six *calendar* months from the 29th of September, (the tenancy commencing March 25,) the Court ruled the word *calendar* to be surplusage, and held the notice good (a).

It was once contended, that the principle, that a notice to quit must expire at the end of the year of the tenancy, did not extend to houses as well as lands; and that in cases where houses alone were concerned, six months' notice, at any period of the year, would be sufficient; but the Court considered that the same inconvenience might arise in the one case as in the other, since the value of houses varies considerably at different periods of the year; and therefore held that the tenant of a house taken by the year was entitled to the same privileges, with respect to the notice to quit, as the occupier of land (b).

The usages with respect to notices to quit do not extend to cases of lodgings; and recent cases have decided, that where lodgings are taken for a certain period, the tenancy terminates at the expiration of that period without notice on either side; and that a new contract for a similar period is implied by law, whenever the tenant continues in possession and enters upon a fresh term, as for a week, if taken by the week, a month, if taken by the month, and the like.

Where *A.* took apartments in a dwelling-house, at a rent payable half-yearly, and entered and paid half-a-year's rent, and before the expiration of the next half-year quitted possession, and at the end of that half-year paid a second half-year's rent, it was ruled, that a taking from year to year could not be inferred from these facts, but a taking for one year only,

(a) *Howard v. Wemsley*, 6 Esp. 53. The marginal note in the report of this case is incorrect.

(b) *Right v. Darby*, 1 T. R. 159; *Doe d. Brown v. Wilkinson*, Co. Litt. 270, (b), n. 1.

and held that no notice was necessary ; Abbott, C. J. observing, "according to the ordinary practice, lodgings are not usually let even for so long a period as a year, and we are now called upon to infer the existence of a contract continuing for two years at least, contrary to the general usage ; the inference arising from these facts is, that the defendant considered himself a tenant for one year, and no longer, and there being no evidence of any express contract creating a tenancy for a longer period than a year, I think that such a contract, which is certainly contrary to the general usage which prevails in letting lodgings, ought not to be enforced (a).

And in a more recent case the rule is thus laid down by Mr. Baron Parke, "I am not aware that it has ever been decided, that in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit must be given. The cases cited are not authorities in support of the proposition (b). A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent, but this is a very different thing from giving a week's notice to quit. The proposition contended for is this, that if a tenant commences a new week without giving notice, he is to be considered as contracting to hold, not only for that week, but also for the following week. I am of opinion, in the absence of any evidence to prove a usage to that effect, that, in point of law, a week's notice to quit is not implied as a part of the contract in the case of an ordinary weekly taking." (c) Another point of importance was also ruled by Mr. Baron Parke, in this case, namely, that a weekly tenancy terminates on the

(a) *Wilson v. Abbott*, 9 B. & C. 89.

(b) *Doe d. Parry v. Hazell*, 1 Esp. 94 ; *Roe d. Peacock v. Ruffin*, 6 Esp. 4 ; *Doe d. Campbell v. Scott*, 6 Bing. 362. In these cases notices commensurate with the pe-

riods of letting had been given, and the Courts only decided that notices for longer periods were unnecessary.

(c) *Huffell v. Armstrong*, 7 C. & P. 56.

day of the week corresponding with the day of its commencement, that is to say, that a party entering on a Monday may quit on a Monday,—“I cannot say a week has been exceeded by holding for six days and two fractions of a day.”

When the custom of the country where the premises are situated requires or allows a notice for a longer or shorter period than half-a-year, (as, for instance, the custom of London, by which a tenant, under the yearly rent of 40s., is entitled to a quarter's notice only) (*a*), the custom will be admitted by the Courts (*b*); but such custom must be strictly proved, and the witnesses must not speak to *opinion*, but *facts* (*c*).

The parties may also by special agreement, vary the time of the duration of the notice; but the notice must, notwithstanding, where the letting is from year to year, expire with the year of the tenancy, unless the agreement also provides some other period for its expiration (*d*). Where, however, the terms of the agreement are not intended to create a tenancy from year to year, determinable at a quarter's notice, but to empower the parties to put an end to the tenancy at other periods of the year, as well as at its termination, the Courts will give effect to it. Thus a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice (*d*); and a demise, where it was agreed “that the tenant was always to be subject to quit at three months' notice,” (*e*) have been held to be demises determinable at the end, although not in the middle of any quarter. But a quarterly reservation of rent is not a circumstance from which an agreement to dispense with a half-yearly notice is to be inferred; although, where the landlord accepted in such case a three months'

(*a*) Tyley v. Seed, Skin. 649.

(*b*) Roe d. Brown v. Wilkinson,
Co. Litt. 270, 6, n. 1.

(*c*) Roe d. Henderson v. Char-
nock, Peake, N. P. C. 4.

(*d*) Doe d. Pitcher v. Donovan,
1 Taunt. 155.

(*e*) Kemp v. Derrett, 3 Campb.
611.

notice from his tenant, without expressing either his assent to, or dissent from such notice, it was ruled at *Nisi Prius* to be presumptive evidence of an agreement that three months' notice should be sufficient (a).

The notice may be given to quit upon a particular day, or in general terms at the end and expiration of the current year of the tenancy, which shall expire next after the end of one half-year from the service of the notice (b). The latter form should always be used when the landlord is ignorant of the period when the tenancy commenced, and is unable to serve the tenant personally; and it is also the preferable form when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered. If a particular day be mentioned in the notice, it must be the day of the commencement, and not of the conclusion of the tenancy; for the tenant cannot be compelled to quit whilst his right of possession continues, and this right is not determined until the year is fully completed. It must also be the *exact* day of such commencement. The next, or any subsequent day, will not be sufficient (c).

The time when a tenancy from year to year commences and expires, takes its date, in the absence of all other circumstances, from the time when the tenant actually enters upon the demised premises (d); but this general rule may be varied, both as to the commencement and expiration of the tenancy, either by express agreement or legal inference.

When a person is let into possession as a yearly tenant, and afterwards takes a lease of the premises, and continues to hold the land after the lease has expired, the time of the expiration

(a) *Shirley v. Newman*, 1 Esp. 266.

(b) Appendix, No. 1, 2, 3; *Doe d. Phillips v. Butler*, 2 Esp. 589.

(c) *Doe d. Spicer v. Lea*, 11 East, 312.

(d) *Kemp v. Derrett*, 3 Campb. 511.

of the tenancy, created by such holding over, will be regulated by the terms of the lease, and not by the time of the original entry. Thus, if a man enters at Lady-day, continues tenant for one or more years, then accepts a lease for a certain term expiring at Michaelmas, and afterwards holds over and pays rent, the notice must be given to quit at Michaelmas, and not at Lady-day (*a*). And the rule extends to the assignees of the original lessee, and their assigns. Whatever may be the period of the year when they enter upon the demised premises, the time of the expiration of their tenancies will be the same as if the original lessee had continued in possession; and it seems immaterial whether they come into possession before or after the expiration of the lease (*b*).

In like manner, when a remainderman receives rent from a person in possession under a lease, granted by the tenant for life, but void against the remainderman, and thereby creates a tenancy from year to year, the time at which a notice to quit, given by such remainderman, must expire, will be regulated by the terms of the lease, and not by the time of the death of the tenant for life (*c*). As, if the lease be for a certain number of years, to commence on the 5th of April, and the tenant for life die on the 30th of September, the proper period for the expiration of the notice will be the 5th of April.

Where also there was a verbal lease to hold for seven years by which the tenant was to enter at Lady-day, and quit at Candlemas, it was held that the lease, although void as to its duration, nevertheless regulated the terms of the tenancy in other respects, and that a notice to quit must expire at Candlemas, and not at Lady-day (*d*).

(*a*) Doe d. Spicer *v.* Lea, 11 East, 312. 1 T. R. 159; Roe d. Jordan *v.* Ward, 1 H. Blk. 97, *ante*, 79.

(*b*) Doe d. Castleton *v.* Samuel, 5 Esp. 173. (*d*) Doe d. Rigge *v.* Bell, 5 T. R. 471; Doe d. Peacock *v.* Raffan, 6 Esp. 4.

(*c*) Doe d. Collins *v.* Weller, 7 T. R. 478; Right d. Flower *v.* Darby,

But where a party entered upon premises under a void agreement for five years and a half, and during that period a negotiation was entered into for a term of twenty-one years "from the expiration of the present term," at an increased rent, but no lease was executed, but the party continued in possession after the expiration of the five years and a half, and paid the increased rent, it was held that the notice to quit should expire at the time of the original entry and not at the time when the tenancy which would have been created by the lease had it been executed, would have expired. The principle of this decision seems to be, that there was not at any time an actual demise of the land, but only negotiations and unexecuted agreements; and, therefore, the case fell within the ordinary rule of construction in cases of tenancies from year to year; which rule is, that the time for giving notice to quit, is fixed and determined by the period of the original entry; though Tindal, C. J., in his judgment, seems in some measure to rely upon the fact, that the increased rent was paid from the expiration of one of the annual periods from the time of the entry, and not from the expiration of the five years and a half (*a*).

It may be collected from these cases, that if there be a lease for years, commencing on one day, and terminating on another, as for example, commencing on Lady-day, and terminating at Michaelmas, a tenancy created by the landlord's receipt of rent after the expiration of the lease, will be held to commence at Michaelmas, and to require half-a-year's notice from Lady-day.

No new tenancy is created by a mere agreement between landlord and tenant for an increase of rent in the middle of the year of a tenancy: but a notice to quit given after the

(*a*) *Berrey v. Lindley*, 3 M. & G. 514.

receipt of the increased rent, must expire at the time when the tenant originally entered (*a*).

When a tenant took possession in the middle of a quarter, paid rent from the time of his coming in up to the next quarter day, (Christmas,) and then paid his rent half-yearly at Midsummer and Christmas, it was ruled at *Nisi Prius* that the tenancy commenced from Christmas, and not from the preceding half-quarter (*b*). But where the tenant entered in the middle of a quarter upon an agreement "to pay rent quarterly and for the half-quarter," it was left to the jury whether the party was tenant from the quarter-day, prior to the time when he entered, or from the succeeding quarter-day; and under the direction of Lord Ellenborough, C. J., the jury found that the tenancy commenced with the preceding quarter (*c*).

When the demise is by parol, and in general terms to hold from feast to feast, as from Michaelmas to Michaelmas, it will be a holding from such feast according to the *new style*; unless by the custom of the country where the lands lie (which custom may be proved by parol testimony) such tenancies commence according to the *old style* (*d*). If, however, the demise be by deed to hold from any particular feast, as "*from the feast of St. Michael's*," &c. the holding must be taken to be according to the new style notwithstanding the custom; and this rule prevails although the tenancy be created by a holding over after the expiration of the lease, and the original entry was according to the old style (*e*).

Upon the same principle a notice to quit at Michaelmas

(*a*) Doe d. Bedford v. Kendrick, Warwick Sum. Ass. 1810.—MS.

(*b*) Doe d. Holcomb v. Johnson, 6 Esp. 10.

(*c*) Doe d. Wadmore v. Selwyn, H. T. 47 Geo. III.—MS.

(*d*) Furley d. Mayor of Canterbury v. Wood, 1 Esp. 198; Doe d. Hall v. Benson, 4 B. & A. 588.

(*e*) Doe d. Spicer v. Lea, 11 East, 312.

generally, *prima facie* means new Michaelmas; but if the tenant entered at old Michaelmas, it will be construed to mean old Michaelmas^(a).

A tenant sometimes enters upon different parts of the land, at different periods of the year, although all are contained in one demise; and the notice to quit must then be given with reference to the substantial time of entry, that is to say, with reference to the time of entry on the substantial part of the premises demised: no notice being taken of the time of entry on the other parts, which are auxiliaries only; though the tenant will be obliged to quit them at the respective times of entry thereon^(b).

This substantial time of entry, it has been contended, must be determined by the times when the rent is payable; but it is holden to depend, either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of the jury to determine.

As few decisions are to be found on these points, it will be useful to give a concise statement of them.

Where the letting was to hold the arable land from the 13th of February, the pasture from the 5th of April, and the meadow from the 12th of May, at a yearly rent payable at old Michaelmas and old Lady-day, the first payment to be made at Michaelmas then next, it was held to be a tenancy from old Lady-day to old Lady-day; because the custom of most countries would have required the tenant to have quitted the arable and meadow lands on the 13th of February, and 12th of

^(a) Doe d. Hinde v. Vince, 2 Campb. 256.

^(b) Doe d. Strickland v. Spence, 6 East, 120.

May, without any special agreement, and a notice to quit at old Lady-day delivered before old Michaelmas was held sufficient (a).

So also upon a demise of the same nature, namely, that the tenant should enter upon the arable land at Candlemas, and the house and other premises at Lady-day, to which was added a proviso, that the tenant should quit the premises "*according to the time of entry as aforesaid*," it was held that the proviso made no alteration in the tenancy, so as to require a notice six months before Candlemas, because it merely expressed what the law would otherwise have implied; that the substantial time of entry was at Lady-day, with a privilege to the tenant on the one hand to enter on the arable land before that period for the purpose of preparing it, and on the other hand a stipulation by him when he quitted the farm to allow the same privilege to the incoming tenant; and, therefore, that a notice to quit, given six months previous to Lady-day, although less than six months before Candlemas, was sufficient (b).

Where the premises contained in the demise consisted of dwelling-houses, and other buildings, used for the purpose of carrying on a manufacture, a few acres of meadow, and pasture land, and bleaching grounds, together with all watercourses, &c. and the tenant held under a written agreement for a lease, to commence as to the meadow ground from 25th of December then last, as to the pasture from the 25th of March then next, and as to the houses, mills, and all the rest of the premises, from the 1st of May, the rent payable on the day of Pentecost and Martinmas, the Court held, that the substantial time of entry was the 1st of May, inasmuch as the substantial subject of the demise was the house and buildings for the purpose of the

(a) Doe d. Dagget v. Snowdon,
2 Blk. 1224.

(b) Doe d. Strickland v. Spence,
6 East, 120.

manufacture, to which every thing else in the demise was merely auxiliary (*a*).

Where a house, and thirteen acres of land, were demised for eleven years, to hold the lands from the 2nd of February, and the house and other premises from the 1st of May, at the yearly rent of 24*l.* payable at Michaelmas and Lady-day, the jury found the land to be the principal subject of the demise: and the plaintiff was nonsuited on account of the notice to quit not having been given six months previous to the 2nd of February. The Court was afterwards moved to set aside the nonsuit, on the ground that the house was the principal part of the demise (being situated near a borough): or, at all events, that the relative value and importance of the house and lands were so nearly balanced, it was immaterial to which the notice referred; but the Court refused the rule, saying, it was for the jury to decide which was the principal, and which the accessory part of the demise (*b*).

And where the tenant entered upon the land on the *second* of February, and the house and outbuildings on the 2nd of May; a notice to quit served on the *sixteenth* of February, requiring the tenant to quit the farm at the end of his *present* year's holding, was held a sufficient notice to determine the tenancy in the ensuing Spring, it not being shown by the tenant that the land was the principal subject of the holding (*c*).

If a notice to quit be given by the tenant in writing and signed by him, but not expiring with the year of his tenancy, his landlord may treat such irregular notice as a surrender of the tenancy (*d*), and by a parity of reasoning if a similar irregular

(*a*) Doe d. Lord Bradford v. Watkins, 7 East, 551.

(*b*) Doe d. Heapy v. Harwood, 11 East, 498.

(*c*) Doe d. Kindersley v. Hughes, 7 M. & W. 139.

(*d*) Aldenburgh v. Peafer, 6 C. & P. 242.

notice be given by the landlord, it must authorize the tenant to give up the farm.

Lastly, of the acts by which a regular notice to quit may be waived.

The acceptance of rent, accruing subsequently to the expiration of the notice, is the most usual means by which a waiver of it is occasioned; but the acceptance of such rent is not of itself a waiver of the notice, but matter of evidence only to be left to the jury, to determine with what views, and under what circumstances, the rent is paid and received.

If the money be taken *nomine pænæ*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be waived, or if there be any fraud or contrivance on the part of the tenant in paying it, or if the payment be accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance. The rent must be paid and received *as rent*, that is to say, it must be so paid and received as to satisfy the jury of an intention to continue the tenancy, or the notice will remain in force. Thus, where the landlord brought an ejectment immediately upon the expiration of the notice, and after the appearance of the tenant in the action, received from him a quarter's rent, accruing subsequently to the day when the notice expired, but nevertheless continued his action, the Court were of opinion, (upon a motion for a new trial, after a verdict for the defendant,) that from the continuance of the suit by the landlord, after the acceptance of the rent, a fair inference might be drawn, that he did not mean to waive his notice; and as that point had not been left for the consideration of the jury, (who had been directed at the trial to find for the defendant, upon the simple fact of the quarter's rent having been paid and received,) the motion for the new trial was

granted (*a*). So, also, where the rent was usually paid at a banker's, and the banker, in the common routine of business, received a quarter's rent from the tenant after the expiration of the notice, no waiver of the notice was thereby created (*b*). But where the notice expired at Michaelmas, 1792, and the landlord accepted rent due at Lady-day, 1793, and did not bring his ejectment until after such acceptance, nor try the cause until 1795, the jury held that the notice was waived (*c*).

The notice may also be waived by other acts of the landlord; but they are all open to explanation, and the particular act will, or will not, be a waiver of the notice, according to the circumstances which attend it. Thus, a second notice to quit, given after the expiration of the first notice, but also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding his second notice, was holden to be no waiver of the notice originally given; because it was impossible for the tenant to suppose, that the landlord meant to waive a notice upon the foundation of which he was proceeding to turn him out of his farm (*d*). Where also, after the expiration of a regular notice to quit, the landlord gave a second notice in these words:—"I do hereby desire you to quit the premises which you *now* hold of me, within fourteen days from this date, or I shall insist upon double value," it was ruled by Lord Ellenborough, C. J., at *Nisi Prius*, that the second notice could not be intended, or understood to be intended, as a waiver of the first, or even as an acknowledgment of a subsisting tenancy *at will*, having for its object merely the recovery of double value; and the lessor of the plaintiff recovered upon a demise anterior to the expiration of the

(*a*) Doe d. Cheny v. Batten, went, 6 T. R. 219.
Cowp. 243.

(*b*) Doe d. Ash v. Calvert, 2
Campb. 387.

(*c*) Goodright d. Charter v. Cord-

(*d*) Doe d. Williams v. Humphreys, 2 East, 236: *et vide*, Messenger v. Armstrong, 1 T. R. 53.

second notice (a). So, also, where a notice was given "to quit the premises *which you hold under me*, your term therein having long since expired," the Court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy (b).

But where the defendant was lessee by assignment of certain tithes, under an agreement which only operated to create a tenancy from year to year, and the impropiator, in March, 1810, (some days after the assignment,) gave the original lessee a notice to quit at the Michaelmas following, and afterwards, in March, 1811, gave the assignee a notice to quit at the then next Michaelmas, the Court were clearly of opinion, that such second notice was a waiver as to the assignee of the former notice given to the original lessee. And, in answer to an argument in support of the efficacy of the first notice, that the original tenancy having expired at Michaelmas, 1810, could not be set up again by another notice to the defendant in 1811, inasmuch as the giving of a person notice to quit does not operate to create a tenancy in him, the Court observed, "It does not necessarily do so, but it is generally considered as an acknowledgment of a subsisting tenancy; and if the party obeys the notice, how can he be deemed a trespasser on account of a prior notice to another person? Nothing appears to shew, that the defendant had knowledge of any other notice to quit than the one which was served upon him;" and *Bayley, J.* added, "the second notice gives the defendant to understand, that if he quits at Michaelmas, 1811, he will not be deemed a trespasser" (c).

It may be collected from this case, that if a tenant, having underlet the premises, receive from his landlord a notice to quit, and the landlord afterwards give to the under-tenant a

(a) Doe d. Digby v. Steel, MS. Taunt. 54.
and 3 Campb. 115.

(b) Doe d. Godsell v. Inglis, 3 East, 53.

(c) Doe d. Brierly v. Palmer, 16

notice to quit, expiring at a subsequent period (*a*), he is precluded from recovering in an ejectment against such under-tenant, upon a demise anterior to the time of the expiration of the notice so given by him to the under-tenant. And if, after the expiration of a regular notice, the landlord should give to the same tenant a second regular notice, in the usual form, to quit at the termination of the next, or any subsequent year of the tenancy, without referring therein to any claim for double value, and without having taken any steps, in the intermediate time, to enforce the first notice, it may be doubted whether such second notice will not also amount to a waiver of the first (*b*).

In a case where a landlord, after the delivery of a notice to quit, promised the tenant that he should not be turned out until the place was sold, and after the sale of the premises, brought an ejectment upon a demise anterior to the time of the sale; it was contended that the permission to occupy was a waiver of the antecedent notice, so far as to prevent the tenant from being considered as a trespasser by relation back to the time when the notice expired, and that the demise ought to have been laid posterior to the day when the contract for the sale was made. But the Court held, that the permission amounted only to a declaration on the part of the landlord, that until the sale of the place, he would suspend the exercise of his right under the notice, and indulge the tenant by permitting him to remain on the premises; and that it was not intended to vacate the notice, or be destructive of any of the rights which the landlord had acquired under it (*c*).

When a regular notice to quit had been given, terminating at Michaelmas, 1835, and previous to August, 1835, the landlord agreed to permit the tenant to continue tenant for another

(*a*) *Ante*, 192.

(*b*) *Vide Doe d. Scott v. Miller*,
2 C. & P. 348.

(*c*) *Whiteacre d. Boulton v. Symonds*, 10 East, 13.

year, "provided he could not obtain a tenant for the farm, at the rent it appeared to him to be worth, by the 1st of August," and the tenant refused to allow a party who had applied for the farm to go over it; it was ruled, that it was an implied condition of the agreement, that the tenant should permit persons applying for the farm to go over it, and that having refused to do so, the agreement was at an end, and the landlord might proceed by ejectment to recover the farm immediately after Michaelmas, 1835, although no new tenant was obtained (a).

The acceptance by the landlord of the double value of the premises, given by statute 4 Geo. II. c. 28, when the tenant wilfully holds over after the expiration of a written notice to quit, or the bringing of an action of debt for the same, will not be a waiver of the notice; for the double value is given as a penalty for the trespass, and not as a payment between landlord and tenant. But if, after the expiration of a notice to quit by the tenant, the landlord accept the double *rent* to which he is entitled by the statute 11 Geo. II. c. 19, it seems that he cannot afterwards proceed upon the notice to quit, for this latter statute recognises the party by the name of tenant, which the first statute does not, and gives a right of distress for the double rent, which is a remedy applicable only to the relation of landlord and tenant (b).

When after the expiration of a written notice to quit a coal mine given by the tenants, they continued for two months working out certain portions of the coal which they considered it was usual for the tenants to take on abandoning such a work, it was held to be a question for the jury to decide, whether or not the tenants in remaining for the two

(a) Doe d. Marquis of Hertford v. Hunt, 1 M. & W. 690. Burr. 1603; Soulsby v. Neving, 9 East, 310; Ryal v. Rich, 10 East,

(b) Doe d. Cheney v. Batten, 48. Cowp. 245; Timmins v. Rowlinson,

months intended to waive the notice, and continue the tenancy (a).

In cases where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover it in an action for use and occupation, the notice will of course be waived (b): but it seems that a pending action for such use and occupation will not be sufficient to invalidate the notice; for the landlord may only recover to the time of the expiration of the notice, although he claim rent to a later period (c). And where a landlord, after a verdict in ejectment founded on a notice to quit, distrained for rent due subsequently to the expiration of the notice, and the party submitted and paid the rent, it was held to be no ground for staying the subsequent proceedings in the ejectment; for the distress was wrongful, and might have been disputed by the tenant (d).

By the common law, if a landlord distrained after the expiration of a term, though for rent accruing during its continuance, he was held to have acknowledged a subsequent tenancy; because, by the common law, no distress could be made after the determination of a demise (e); but since the statute 8 Ann. c. 14, ss. 6 & 7, by which a landlord is allowed to distrain within six calendar months after the determination of a lease for life, for years, or at will, provided his own title, or interest, and the possession of the tenant, from whom such rent became due, be continuing, a distress for rent accruing at the time of the expiration of the notice to quit, if made within the six months, will be no waiver thereof. But this

(a) *Jones v. Shears*, 4 Ad. & El. 832.

(b) *Zouch d. Ward v. Willingale*, 1 H. Bl. 311.

(c) Per Buller, *J. Birch v. Wright*,

1 T. R. 378; *et vide* *Roe d. Crompton v. Minshall*, S. N. P. 650.

(d) *Doe d. Holmes v. Darby*, 8 Taunt. 538.

(e) *Pennant's case*, 3 Co. 64.

statute does not apply to cases where the tenancy is terminated by the wrongful disclaimer of the tenant. In such cases a distress amounts to a waiver of the disclaimer (a).

Where a tenancy from year to year subsists between the parties, an ejectment cannot be maintained on a *parol* notice to quit at a shorter period than half-a-year, or expiring at a wrong period of the tenancy, notwithstanding the assent of the tenant to such notice, unless such assent be *in writing*; because the notice being insufficient in itself to determine the tenant's interest, his assent can only make it operative as a surrender of the term; and as such surrender is not by operation of law, but an actual surrender by agreement between the parties, it is void by the Statute of Frauds, which requires that such surrender should be by note in writing (b).

As the relation of landlord and tenant is mutual, the rules for the regulation of notices to quit when given by tenants are of course similar *mutatis mutandis* to those by which notices from landlords are governed. They must be the same in form and substance, expire at the like periods of the year, are dependent upon like rules as to the time and mode of service, and may be waived by similar acts.

Secondly, of the termination of a tenancy by the non-payment of rent, or the non-performance of a condition or covenant (c).

The right to terminate a tenancy by a notice to quit is

(a) Doe d. David v. Williams, 9 C. & P. 322.

(b) Doe d. Huddlestone v. Johnston, 1 M'Leland and Yonge, 141; Johnson v. Huddlestone, 4 B. & C. 922.

(c) As the non-payment of rent is also the non-performance of a

covenant, this particular enumeration may perhaps be logically incorrect; but as the proceedings differ so materially in case of non-payment of rent, and of non-performance of other covenants, it has been thought most conducive to perspicuity to name them separately.

given by the common law, and is necessarily incidental to a tenancy from year to year: the termination of a tenancy by the non-payment of rent, or the breach of a covenant or condition, arises only under express agreement, and seldom occurs but where the tenant has a written lease for a determinate period.

It has already been observed (*a*), that an actual entry upon the lands was formerly necessary before an ejectment could be maintained, and that the claimant's title must be of such a nature as to render his entry lawful. When, therefore, a lease for years was granted to the tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term; and was consequently without remedy to recover back his possession whilst the term lasted, although the tenant should neglect to render his rent, or otherwise disregard the conditions of his grant. When terms for years increased in length and value, this became a serious evil to landlords. The tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be left without a sufficient distress to countervail an arrear of rent. As a means of obviating these difficulties, it became the practice for landlords to insert in their leases a proviso declaring the lease forfeited, if the rent remained unpaid for a certain time after it became due, or if any other particular covenant of the lease were broken by the lessee, and empowering the landlord in such cases to re-enter upon, and re-occupy his lands.

When provisos of this nature were first introduced, the ancient practice prevailed, and of course actual entries were then made in these as in all other cases; and it seems also to have been necessary, for some years after the modern practice

(*a*) *Ante*, p. 10.

was invented, and the sealing of leases dispensed with, for landlords to make actual entries upon the lands, before they could take advantage by ejectment of the forfeiture of a lease. This useless form is now indeed abolished; but as the right to make the entry is still necessary, the provisos are continued to the present day in their ancient terms (*a*).

Having thus briefly shown the principles upon which these provisos are founded, we shall now inquire, first as to the covenants deemed by our law to be valid; secondly, as to what will amount to the breach of any particular covenant, and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28, on a clause of re-entry for non-payment of rent; and, thirdly, as to the modes by which conditions may be dispensed with, or forfeitures waived.

The landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to the laws of the kingdom, nor to the principles of reason, or public policy; and it is by these general maxims we must be guided, when called upon to consider the validity of any particular covenant in a lease; for only one decided case upon the subject is to be found in our legal authorities.

The lease in that case was for twenty-one years, and the proviso, that the landlord might re-enter, if the tenant became bankrupt. This proviso was holden valid, upon the principle, that as it is reasonable for a landlord to restrain his tenant from assigning, so it is equally reasonable for him to guard against such an event as bankruptcy, for the consequences of bankruptcy would be an assignment; and that such a proviso is not contrary to any express law, nor against reason or

(*a*) Little *v.* Heaton, Salk. 258, 1 Vent. 248; Wither *v.* Gibson, 3 S. C. Ld. Raym. 750; Goodright Keb. 218.
d. Hare *v.* Cator, Doug. 477; Anon.

public policy, for it is a proviso which cannot injure the creditors, who would not rely on the possession of the land by the occupier without a knowledge also of the interest he had therein; and to discover this they must look into the lease itself, where they would find the proviso that the tenant's interest would be forfeited in case of bankruptcy. Buller, J. in his judgment on the case, made a distinction between leases for short terms, and very long leases, with respect to provisos of this nature; because if they were to be inserted in very long leases, it would be tying up property for a considerable length of time, and be open to the objections of creating a perpetuity; but he afterwards adds, that the principal ground of his decision was, because it was a stipulation not against law, nor repugnant to any thing stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which it was competent for the lessor to make (a).

Secondly, Of what will amount to the breach of any particular covenant, and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28, on a clause of re-entry for non-payment of rent.

The power generally reserved in leases to landlords, to re-enter in case the rent shall remain in arrear for a certain time after it is due, is the most common proviso upon which ejectments for forfeitures are founded, and as several provisions are made, both by the common and statute law, for regulating ejectments brought upon such provisos, a separate consideration of the mode of proceeding upon a clause of re-entry for rent in arrear, seems the most perspicuous method of treating the subject.

At the time when provisos for re-entry were first introduced it was unfortunately the practice to disfigure our legal maxims

(a) *Roe d. Hunter v. Galliers*, 2 T. R. 133.

with endless subtilties and distinctions; and the preliminaries required by the common law, before a landlord can bring an ejectment upon a clause of re-entry for non-payment of rent, are so numerous, as to render it next to impossible for any, unversed in the practice of the Courts, to take advantage of a proviso of this nature. "First, a demand of the rent must be made, either in person, or by an agent properly authorized (*a*). Secondly, the demand must be of the precise rent due (*b*); for if he demand a penny more, or less, it will be ill. Thirdly, It must be made *precisely upon the day* when the rent is due, and payable, by the lease, to save the forfeiture; as, where the proviso is, "that if the rent shall be behind and unpaid, by the space of thirty, or any other number of days after the day of payment, it shall be lawful for the lessor to re-enter," a demand must be made on the thirtieth, or other last day. Fourthly, It must be made a convenient time before sunset (*c*). Fifthly, It must be made upon the land, and at the most notorious place of it. Therefore, if there be a dwelling-house upon the land, the demand must be at the front or fore door, though it is not necessary to enter the house, notwithstanding the door be open; but if the tenant meet the lessor either *on* or *off* the land, *at any time* of the last day of payment, and tender the rent, it is sufficient to save a forfeiture, for the law leans against forfeitures. Sixthly, Unless a place is appointed where the rent is payable, in which case the demand must be made at such place. Seventhly, A demand of the rent must be made *in fact*, although there should be no person on the land ready to pay it." (*d*).

(*a*) Roe d. West v. Davies, 7 East, 363.

(*b*) That is to say, of the precise rent due, *by the non-payment whereof the forfeiture will be incurred*; as a quarter's rent, if the rent be payable quarterly, half-a-year's rent, if payable half-yearly, and so forth; and if there be any previous arrears of rent, and the rent demanded

include such arrears, it will not be sufficient to work a forfeiture. Doe d. Wheeldon v. Paul, MS.; S. C. 3 C. & P. 613.

(*c*) According to the case of Doe d. Wheeldon v. Paul, 3 C. & P. 613, the demand ought to be made at the last hour of the day, *at sunset*.

(*d*) 1 Saund. 287, (n. 16).

Nor are these the only vexatious difficulties to which a landlord, by the common law, was subject. The Courts, notwithstanding his compliance with all the required formalities, would set aside the forfeiture, upon payment of the debt and costs, at any time before execution executed; (a) and the tenant might at any time apply to a Court of Equity for relief.

Where the ejectment is brought upon a clause of re-entry, and *less than six months' rent is due*, all these difficulties still exist, (unless dispensed with by the express words of the lease) (b), but, by the wise provisions of the Legislature, the landlord is now relieved from the two latter inconveniences in all cases where six months' rent is in arrear; and is also exempted from an observance of the forms and niceties of the common law, if there be likewise no sufficient distress upon the premises.

By the 4 Geo. II. c. 28, s. 2, it is enacted, that, in all cases between landlord and tenant, as often as one half-year's rent shall be in arrear, and the landlord hath right by law to re-enter for the non-payment, he may, without any formal demand or re-entry, proceed by ejectment to recover the premises, or in case a declaration cannot be served, or no tenant be in actual possession, he may affix the same upon the door of the messuage, or if no messuage, then upon some notorious place of the demised premises, and such affixing shall be deemed legal service, and stand in the stead of a demand and

(a) *Roe d. West v. Davis*, 7 East, 363, and the cases there cited.

(b) *Doe d. Harris v. Masters*, 2 B. & C. 490. Wood, B. in his judgment in the Exchequer Chamber, in the case of *Doe d. Lord Jersey v. Smith*, 1 B. & B. 178, intimated a strong opinion that the stat. 4 Geo. II. c. 28, put an

end to all proceedings by re-entry at common law, and repeated that opinion in his judgment on the same case in the House of Lords (2 B. & B. 554); but his opinion was not supported by any other Judge; and many of the Judges expressed their dissent from it.

re-entry ; and in case of judgment against the casual ejector, or nonsuit for not confessing, it shall be made appear to the Court by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the declaration was served, and that no sufficient distress was to be found on the premises, countervailing the arrears then due, and that the lessor in ejectment had power to re-enter ; that then the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made ; and in case the lessee shall suffer judgment to be recovered on such ejectment, and execution executed thereon, without paying the rent and costs, and without filing any bill for relief in equity, within six calendar months after such execution executed ; then such lessee, and all other persons claiming and deriving under the said lease, shall be barred from all relief or remedy in law or equity, other than by writ of error, for reversal of the judgment, and the landlord shall hold the premises discharged from the lease : provided that the right of any mortgagee of such lease, who shall not be in possession, shall not be barred, so as such mortgagee shall, within six calendar months after judgment and execution, pay all rent in arrear, and all costs and damages sustained by the lessor, and perform all the covenants and agreements of the lease.

By section 3, in case the said lessee shall within the time aforesaid, file a bill for relief in equity, he shall not have or continue any injunction, against the proceedings at law, unless he shall, within forty days next after a full answer shall be filed by the lessor of the plaintiff, bring into Court such sum of money as the lessor shall, in his answer swear to be due and in arrear, over and above all just allowances, and costs, there to remain till the hearing of the cause, or to be paid out to the lessor on good security, subject to the decree of the Court ; and in case such bill shall be filed within the above named time, and after execution is executed, the lessor

of the plaintiff shall be accountable only for so much and no more as he shall really and *bonâ fide* make of the demised premises from the time of their entering into possession; and if what shall be so made by the lessor happen to be less than the rent reserved, then the lessee, before he shall be restored to his possession, shall pay such lessor what the money so by them made, fell short of the reserved rent, for the time such lessor held the lands.

The fourth section provides, that if the tenant shall before the trial of the ejectment, pay or tender to the lessor or his attorney, or pay into the Court all the rent and arrears, and costs, then all further proceedings shall cease; and if such lessee shall, upon any bill, be relieved in equity, he shall hold the demised lands, according to the lease, without any new lease being made.

Some little perplexity attends the wording of these sections, which seem, upon the first reading, to extend only to cases of ejectment brought after half-a-year's rent due, where the landlord has a right to re-enter, and where no sufficient distress is to be found upon the premises; but the statute has been held to be more general in its operation, and its provisions, (with the exception of the one which dispenses with the formalities required by the common law upon a clause of re-entry for non-payment of rent,) extend to all cases where there is six months' rent in arrear, and a right of re-entry in the landlord (a).

The Legislature appear to have four different objects in view in the enactments of this statute. First, to abolish the idle form of a demand of rent, where no sufficient distress can be found upon the premises to answer that demand; secondly, in cases of beneficial leases which may have been mortgaged,

(a) *Roe d. West v. Davis*, 7 East, 363.

to protect the mortgagees against the fraud or negligence of their mortgagors. Thirdly, to render the possession of the landlord secure after he has recovered the lands; and fourthly, to take from the Court the discretionary power they formerly exercised, of staying the proceedings, at any stage of them, upon payment of the rent in arrear, and costs. The first of these objects is effected by permitting the landlord to bring his ejectment without previously demanding the rent: the second, by permitting a mortgagee not in possession to recover back the premises at any time within six months after execution executed, by paying all the rent in arrear, damages, and costs of the lessor, and performing all the covenants of the lease (*a*): the third, by limiting the time for the lessee or his assigns to make an application to a Court of Equity for relief, to six calendar months after execution executed: and the fourth, by limiting the application of the lessee to stay proceedings, upon payment of the rent in arrear and costs, to the time anterior to the trial, and making it compulsory upon the Court to grant the application when properly made (*b*).

As this statute dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises as well as six months' rent in arrear, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed upon a clause of re-entry for non-payment of rent, if a sufficient distress can be

(*a*) It is difficult to discover from the report of the case of *Doe d. Whitfield v. Roe*, 3 Taunt. 402, what was the true point submitted to the judgment of the Court. It is quite clear it is not the one stated in the margin, viz. "that the mortgagee of a lease has the same title to relief, against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had," be-

cause by the provisions of this statute, a lessee can only have relief against an ejectment for a forfeiture, upon paying the arrears of rent and costs of suit into Court *before trial*, whereas a mortgagee may obtain relief upon paying the arrears, costs, and damages, at any time *within six months after execution executed*.

(*b*) *Roe d. West v. Davis*, 7 East, 363.

found (a). But an insertion in the proviso of the lease, that the right of re-entry shall accrue *upon the rent being lawfully demanded*, will not render a demand necessary if there be no sufficient distress, for it is only stating in express words, that which is in substance contained, from the principles of the common law, in every proviso of this nature (b).

To dispense with the demand for rent, it is also necessary that full evidence should be given that no sufficient distress was to be found upon the premises, by shewing that strict search has been made in every part of them (c); unless, indeed, the landlord can shew that he was prevented by the tenant from entering to distrain, the words "no sufficient distress" having been ruled by Lord Tenterden to mean, "no sufficient distress which can be got at." (d) And where upwards of six months' rent is in arrear, the demand will not be dispensed with if there be a sufficient distress to counteract the arrear of six months, though insufficient to meet the whole amount due (e).

It has been observed that the provisions of this statute, (with the exception of the one relating to the demand of rent) extend to all cases where there is six months' rent unpaid, and the

(a) Doe d. Forster v. Wandlass, 7 T. R. 117; Doe d. Chandless v. Robson, 2 C. & P. 245; Doe d. Bias v. Horsley, 1 Ad. & Ell. 766; *vide* Smith v. Spooner, 3 Taunt. 251. If the reader can comprehend the meaning of the expressions reported to have been used by the Judges in pages 251, 252, of the report of this case, he will be more fortunate than the writer of this note.

(b) Doe d. Schofield v. Alexander, 2 M. & S. 525. Lord Ellenborough, C. J. differed from the other Judges in this case, he being of opinion,

that when the words "*being lawfully demanded*" were inserted in a proviso for re-entry, they were to be considered as a stipulation between the parties that the rent should be, in fact, demanded (though not with the strictness of the common law) before ejectment brought.

(c) Rees d. Powell v. King, cited, 2 B. & B. 514.

(d) Doe d. Chippendale v. Dyson, 1 M. & M. 77.

(e) Doe d. Powell v. Roe, 9 Dow. P. C. 548.

landlord has a right to re-enter. This point has only been decided upon that part of the fourth section which directs all proceedings to be staid upon payment of the rent in arrear and costs before trial; but the principle of the decision seems to apply to all the other provisions of the statute, as well as to the one then immediately before the Court.—It was objected in that case, that *the statute* only applied to cases of ejectment brought after half-a-year's rent due, where no sufficient distress was to be found upon the premises, but Lord Ellenborough, C. J. says, "*the statute* is more general in its operation; for though the fourth clause has the word *such* (such ejectment,) yet the second clause to which it refers is in the disjunctive; stating first, that in *all* cases between landlord and tenant, when half-a-year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment, &c., *or* in case the same cannot be legally served, &c., *or* in case such ejectment shall not be for the recovery of any messuage, &c., and in case of judgment against the casual ejector or nonsuit for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter; *then, and in every such case*, the lessor in ejectment shall recover judgment and execution" (a).

By the words of the fourth section the lessee is to pay the arrears of rent, &c., into Court *before the trial*; and no provision is expressly made for his relief in case he should suffer judgment to go by default against the casual ejector; but the Courts do not consider a judgment so obtained as equivalent to a trial, but will grant relief to the lessee at any time before execution executed (b).

(a) *Roe d. West v. Davis*, 7 East, 363.

(a) *Goodtitle v. Holdfast*, Stran. 900; *Doe d. Harris v. Masters*, 2

The provision of this fourth section seems also to extend only to cases where the rent and costs are tendered to the lessor, or paid into Court after action brought; yet where the tenant tendered the rent in arrear after the lessor had given instructions to his attorney to commence an action, but before the declaration had been delivered, the Court set aside the proceedings with costs, although it was urged by the lessor that such tender was merely matter of defence at the trial (*a*).

Where the ejectment was brought on a clause of re-entry in the lease for not repairing, as well as for rent in arrear under the statute, it was argued, on a motion to stay proceedings upon payment of the rent, that the case was not within the act, because it was not an ejectment founded singly on the non-payment of rent; but the Court, notwithstanding, made the rule absolute, with liberty for the lessor to proceed on any other title (*b*). But where the lessor has recovered possession of the premises, a Court of Equity will not grant relief under the second section, if such recovery was by reason of the breach of other covenants or conditions, as well as by the non-payment of rent. And where the tenant applied to the Court of Chancery to relieve against a recovery upon a judgment by default against the casual ejector, alleging that the ejectment was brought for a forfeiture incurred by non-payment of rent, which allegation was contradicted by the landlord, who stated in his answer, that the tenant had also broken many of the covenants of the lease, for which the landlord had a right to re-enter; the Court directed an issue to try, whether the landlord knew of any of the breaches of the covenant at the time of bringing the ejectment (*c*).

B. & C. 490; *Vide* Doe d. Marquis
of Westminster v. Suffield, 5 Dow.
P. C. 660.

(*a*) Goodright d. Stephenson v.
Noright, Black. 746.

(*b*) Pure d. Withers v. Sturdy,
B. N. P. 97.

(*c*) Wadman v. Calcrafft, 10 Vez.
67.

Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them, the defendant moved to stay proceedings on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring ejectment as executors; there appeared to be a mutual debt to the defendant by simple contract, and the defendant offered to go into the whole account, taking in both demands, as devisees and executors, having just allowances, which the lessors of the plaintiff refused: the rule was made absolute to stay proceedings on payment of the rent due to the lessors as devisees, and costs (*a*).

The proceedings may be staid, either by moving the Court, or in Vacation time by summons (*b*).

In moving for judgment against the casual ejector in an ejectment brought under the provisions of this statute, the Court will not grant a rule for judgment without an affidavit (*c*), pursuant to the statute, that half-a-year's rent was in arrear

(*a*) Duckworth d. Tubley v. Tunstall, Barn. 184.

(*b*) 2 Sell. Prac. 127.

(*c*) In the case of Doe d. Hitchings v. Lewis, (Burr. 614), it appeared that the lessor of the plaintiff had once been tenant to the defendant, under a lease for a term of years, of which some were yet to come, and had been ejected by him nearly twenty years before, by a judgment in ejectment against the casual ejector, pursuant to the statute of 4 Geo. II. c. 28, for non-payment of rent. The title set up by the lessor in this last action was the irregularity of the proceedings in the first ejectment, from the want of a proper affidavit whereon to ground the judgment; and the

question for the Court to decide was, whether it was necessary for the defendant (the original landlord) to give evidence of this affidavit. The Court were unanimously of opinion, that from the lapse of years no such evidence was necessary; but it seems to have been Lord Mansfield's opinion, that if the lessor of the plaintiff in the second action had proved, that in point of fact no affidavit had been made, he would have been entitled to recover. But *quære*, if the proper method in such case, if the judgment be recent, is not to move the Court, upon affidavit of facts, to set aside the judgment for irregularity.

before declaration served, that the lessor of the plaintiff had a right to re-enter, and that no sufficient distress was to be found upon the premises countervailing the arrears of rent then due: and the affidavit must also state the service of the declaration in ejectment on the tenant in possession, or that the premises were untenanted, or that the tenant could not be legally served, or as the facts may be, and in such cases that a copy of the declaration was affixed on the most notorious (stating what) part of the premises (*a*).

This affidavit is of course only necessary upon moving for judgment against the casual ejector, or after a nonsuit at the trial for the tenant's not confessing lease, entry and ouster; but if the tenant appear, and the ejectment come to trial, the matters contained in the above affidavit must be proved (*b*).

Where by a written agreement *A.* agreed to let, and *B.* agreed to take premises for a term of years, "at and under the yearly rent of 80%," and the agreement contained several specific agreements by *B.* to do certain things, but there was no specific agreement to pay the rent, and a power of re-entry was reserved in case of a breach of "any of the agreements therein contained," it was held, that the power extended to the non-payment of rent (*c*).

Where a lease contained two clauses for re-entry, the one in case the yearly rent of 300% was in arrear thirty days after it became payable, and the other in case the yearly rent was in arrear, which was stated to be payable half-yearly at Lady-day and Michaelmas; it was held, that the landlord had a right to re-enter on non-payment of each half-year's rent: the

(*a*) App. No. 19; Doe d. Seabrook v. Roe, 4 B. Moore, 350; Doe d. Evans v. Roe 4 B Moore, 469.

(*b*) Doe d. Hitchings v. Lewis, Burr. 614, 20.

(*c*) Doe d. Rains v. Kneller, 4 C. & P. 3.

former clause containing the description of the amount to be annually paid, and the latter the times for payment (*a*).

When a forfeiture has accrued upon a clause of re-entry for rent in arrear, such forfeiture will be waived if the landlord do any act after the forfeiture, which amounts to an acknowledgment of a subsisting tenancy; as if he receives rent due at a subsequent quarter, or distrain for that in respect of which the forfeiture accrued, or receive the same and give a receipt for it as for so much rent, or in which he calls the party his tenant. It seems, however, according to the old authorities, that in the case of a lease for years, the bare acceptance by the lessor at a subsequent day of the rent, in respect of which the forfeiture accrued, although before ejectment brought, will not of itself, unless accompanied with circumstances which show an intention to continue the tenancy, bar him of his right to re-enter, because the rent is a duty due to him, and as well before as after re-entry, he may have an action of debt for the same on the contract between the lessor and lessee; but that in the case of a lease for life, the mere acceptance of such rent will be sufficient to affirm the lease, as the lessor could not receive it as due upon any contract, but must receive it as his rent; for when he accepted the rent he could not have an action of debt for it, but his remedy was by assize, if he had seizin or distress (*b*).

Where an ejectment was brought upon a proviso of re-entry for non-payment of rent, and the lessor also commenced an action of covenant for rent, accruing subsequently to the day of the demise in the ejectment, and the tenant paid into Court the rent demanded in the action of covenant, the forfeiture was holden to be waived; but it seems doubtful whether the

(*a*) Doe d. Rudd v. Golding, 6 S. C. 1 Leon. 262; Pennant's case, 3 Co. 64, *et vide* Doe d. Cheney v. Moore, 231.

(*b*) Green's case, Cro. Eliz. 3. Batten, Cowp. 243.

commencement of the action of covenant was *of itself* sufficient to waive the forfeiture (a).

A right of re-entry for non-payment of rent under the stat. 4 Geo. II. c. 28, will not be waived by taking an insufficient distress for that rent, nor by continuing in possession under such distress after the expiration of the last day for the payment of the rent (b). But the mere act of taking a distress, although an insufficient one, is a waiver of a right of re-entry at common law (c).

(a) Doe d. Crampton v. Minshul, B. N. P. 96; S. N. P. 650.

(b) Doe d. Taylor v. Johnson, 1 Stark. 411.

(c) Brewer d. Lord Onslow v. Eaton, K. B. *Easter Term*, 1773, MS. This case, as cited in Goodright d. Charter v. Cordwent, 6 T. R. 220, seems to warrant a conclusion, that the taking of an insufficient distress will not waive a right of re-entry at common law. I have been favoured by Mr. Jardine with a MS. report of the case, taken from the note-book of Gibbs, C. J. (the marginal note being in his handwriting, and the body of the note in the handwriting of Mr. Justice Dampier), which limits the principle to cases under the stat. 4 Geo. II. c. 28. The note is subjoined.

Brewer d. Lord Onslow v. Eaton. An ejectment may be supported on 4 Geo. II. c. 28, though the landlord, subsequently to the time of the demise, distrained for rent accruing previously to that, for the non-payment of which the ejectment was brought.

Ejectment under 4 Geo. II. c. 28,

for non-payment of rent, £200, was in arrear for two years' rent due at Michaelmas 1782; on the 3rd of December, Lord Onslow distrained, and could levy but 35*l*. For this distress a replevin was still subsisting; the declaration in ejectment was delivered in January, and the demise laid in October 3rd, 1782. The plaintiff had a verdict before Mr. J. Ashurst, and liberty was reserved for the defendant to move for a nonsuit if this Court should admit of an objection which was now pursued; viz. that the landlord having taken a distress subsequently to the time of the demise, had thereby waived his right of entry.

Erskine for Plaintiff; *Morgan* for Defendant.

Lord Mansfield, C. J. At common law, if a distress had been taken after an ejectment brought for a forfeiture, the Court would lay hold of this or any other grounds they could, to say the landlord had waived his forfeiture, because forfeitures are reckoned odious in law. It is like the receipt of rent after the demise, about which there was so long a puzzle. That is now finally settled to be no objection to an eject-

With respect to the construction of provisoes for re-entry for the non-performance of covenants or conditions, no general

ment; it is receiving what the landlord might have recovered in an action for mesne profits. Here the party has a right of re-entry; then, by the statute, he has a right to recover in a particular way, if there is not a sufficient distress. He has distrained since: that is no presumption of the waiver of his right of entry, because it is consistent with it; it seems a necessary step to ascertain the sufficiency of the distress.

Willes, J. At common law the landlord had two remedies, re-entry and distress. The resorting to the latter would have been a waiver of the re-entry; but if the distress be not sufficient, the statute restores that remedy, when, by the common law, the waiver had taken it away.—Rule discharged.

It may be useful to notice in this place a provision of the Legislature in one particular case of rent in arrear, although it does not strictly belong to a treatise on ejectment. By the statute 11 Geo. II. c. 19, s. 16, (extended by 57 Geo. III. c. 52, to cases where a half-year's rent shall be in arrear), after reciting, that landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated, without any distress thereon, whereby the landlords or lessors might be satisfied for the rent in arrear; but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering them in ejectment; it

is enacted, "that if any tenant holding any lands, tenements, or hereditaments, at a rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent; it shall and may be lawful, to and for two or more justices of the peace of the county, riding, division, or place, (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part of the premises, notice in writing, what day (at the distance of fourteen days at least), they will return to take a second view thereof; and if upon such second view, the tenant, or some person on his or her behalf, shall not appear, and pay the rent in arrear, or there shall not be sufficient distress upon the premises; then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises, and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void."

Section 17. "Provided always that such proceedings of the said justices shall be examinable in a summary way, by the next justice or justices of assize of the respec-

principle can be laid down, excepting that which arises out of the maxim of our law, that every doubtful grant shall be construed in favour of the grantee; but no strained or forced interpretation shall be given to any covenant or condition, for the purpose of defeating its effect. "Provisoes of this sort," says Lord Tenterden, "are not to be construed with the strictness of conditions at common law. These are matters of contract, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisos ought to be construed according to fair and obvious construction, without favour to either side (a)."

The clearest method of shewing the application of these rules, will be by giving a short digest of the cases upon the subject.

Where the lessee covenanted not to *assign* his term without the lessor's consent, and afterwards *devised* his term without such consent, it was holden not to amount to a forfeiture, for a *devise* is not a *lease* (b).

Where the lessee covenanted not to demise, assign, transfer, or set over, or *otherwise do or put away* the lease or premises or

tive counties in which such lands or premises lie; and if they lie in the city of London, or county of Middlesex, by the Judges of the Courts of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the Judges thereof; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if

they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs, not exceeding five pounds, for the frivolous appeal." The provisions of this statute, however, like those of 4 Geo. II. c. 28, are holden to extend only to cases where the landlord has a right of re-entry reserved to him by the demise. Wood, L. & T. 523.

(a) Doe d. Davis v. Elsom, 1 M. & M. 189.

(b) Fox v. Swan, Sty. 482.

any part thereof, and afterwards made an *under-lease* of the premises, it was held not to be a breach of the covenant, for an *under-lease* is not an *assignment*. And it was said by the Court, in answer to an argument, that although an *under-lease* did not amount to an *assignment*, yet that it was a *transferring, setting over, doing, or putting away with the premises*, that the devising a term *was a doing or putting it away*, so being in debt by confessing a judgment, and having the term taken in execution was the like, but that none of these amounted to a breach of the covenant (a).

It seems to have been once holden, that if a lessee for years grant the lands to another for the whole term he has therein, but reserve the rent payable to himself, and not to the original lessor, it will be a lease, and not an assignment, notwithstanding the want of a reversion in the party so granting; but this doctrine, if the decision were as reported, has since been overruled (b).

Where the lease contained a proviso, that the lessee should not *let*, or *assign over*, the whole, or any part, of the premises, it was held that the lessee could not *under-let* without incurring a forfeiture; because the word *over* was annexed only to the word *assign*, and therefore the condition was broken if the lessee *let* the premises, or any part of them, for any part of the time (c). And where the proviso was not to assign, or *otherwise part with the premises*, for the whole, or any part, of

(a) *Crusoe d. Blencowe v. Bugby*, 3 Wils. 234.

(b) *Poultney v. Holmes*, Stran. 405; *Palmer v. Edwards*, Doug. 187, *in notis*. It seems from these cases, that a parol assignment of the whole term, which is void by the Statute of Frauds, will be good as an *under-lease*; but *quære* if the

tenancy thereby created does not enure as a tenancy from year to year, and not as a tenancy for the residue of the term. *Vide Doe d. Rigge v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3.

(c) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

the term, the proviso was held to be broken by an under-lease, as well as by an assignment (a).

Where the covenant, was not to set, let, assign, transfer, set over, or *otherwise part with*, the premises thereby demised, or *that present indenture of lease*, a deposit of the indenture with a creditor, as a receipt for money advanced, was held not to be a *parting with it*, within the meaning of the covenant (b).

Where a lease contained a proviso for re-entry in case the tenant should demise or let the demised premises, or any part thereof, for all or any part of the term, the lessee agreed with a person to enter into partnership with him, and that he should have the use of certain parts of the premises *exclusively*, and of the rest jointly with him the tenant, and accordingly let him into possession; it was held that the lease was forfeited, for that it was a parting with the exclusive possession of some part of the demised premises, and whether it were gratuitously or for rent reserved was immaterial (c).

A covenant not to under-let any part of the premises without license, is not broken by taking in lodgers; for, per Lord Ellenborough, C. J. "The covenant can only extend to such under-letting as a license might be expected to be applied for, and who ever heard of a license from a landlord to take in a lodger (d)?"

A covenant not to "alien, sell, assign, transfer, and set over, or *otherwise part with the lease*" of a public house, is not broken by depositing the lease with the brewers to cover advances by them (e).

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| (a) Doe d. Holland v. Worseley, | M. & S. 297. |
| 1 Campb. 20. | (d) Doe d. Pitt v. Laming, 4 |
| (b) Doe d. Pitt v. Laming, 1 R. | Campb. 77. |
| & M. 36. | (e) Doe d. Goodbehere v. Bevan, |
| (c) Roe d. Dingley v. Sales, 1 | 3 M. & S. 353. |

Where the lessee enters into covenants not to assign, &c., the Court will distinguish between those acts which are done by him voluntarily, and those which pass *in invitum*, and will not hold the latter to be a breach of the covenant. Thus, if the lessee become bankrupt, and the term be assigned under the commission, no forfeiture will be incurred (a); unless, indeed, there be an express stipulation in the proviso that it shall extend to the bankruptcy of the lessee (b). And where a lessee, who had covenanted not to "let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," with a proviso, that in such case the landlord might re-enter, afterwards gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; it was held to be no forfeiture of the lease, unless the warrant of attorney were given expressly for the purpose of having the lease taken; for judgments, in contemplation of law, always pass *in invitum*. And Lord Kenyon, C. J. said, "there was no difference between a judgment obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney; since the latter is merely to shorten the process, and lessen the expense of the proceedings:" but if the warrant of attorney be expressly given for the purpose of having the lease taken in execution, it will be held to be in fraud of the covenant, and a forfeiture of the lease (c).

This protection extends also to the party to whom the term is by law assigned. The reason of this is, that such assignee cannot be encumbered with the engagement belonging to the property which he takes, but must be allowed to divest himself of it, and convert it into a fund for the benefit of the cre-

(a) Doe d. Pitt v. Hogg, 1 C. & T. R. 133.
P. 160.

(c) Doe d. Mitchinson v. Carter,

(b) Roe d. Hunter v. Galliers, 2 8 T. R. 57, 300.

ditors; and therefore a forfeiture is not incurred, if the assignees sell the term (a).

But where one leased for twenty-one years, "if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and *actually occupy* the lands, &c. and not let, set, assign over, or otherwise depart with the lease," the tenant having become bankrupt, and his assignees having possessed themselves of the premises, and sold the lease, and the bankrupt being out of the possession and occupation of the farm, it was held, that the lessor might maintain ejectment. And this case was distinguished from the one just mentioned, as not being a case of forfeiture; but one in which the term itself was made to continue and depend upon the personal occupation of the lessee, and that therefore the term itself ceased, when the lessee had no longer the occupation of the farm (b).

Where a lease contained a proviso for re-entry if the lessor, "his executors or administrators, or either of them should become bankrupt," and the executor became bankrupt, it was held, that the proviso attached; Parke, B., observing, "that where words are so clear, parties must be bound by their own express stipulations, however absurd (c)."

Where the lease contained a proviso for re-entry on the lessee assigning without license, and the lessee executed a deed purporting to convey all his property real and personal to trustees for the benefit of his creditors, and afterwards a commission of bankrupt was taken out against him, and he was duly declared a bankrupt; it was held that the trust-deed, being an act of bankruptcy and void, did not operate as a

(a) Doe d. Goodbehere v. Bevan, 8 East, 185.
3 M. & S. 353.

(c) Doe d. William v. Davies, 6
C. & P. 614; S. C. 5 Tyrr. 125.

(b) Doe d. Lockwood v. Clarke,

valid assignment of the lessee's interest in the lease, nor create a forfeiture (a).

It has been doubted whether a proviso that the lease shall cease, and from thenceforth become absolutely void if the lessee shall during the continuance of the term "happen to become insolvent and unable in circumstances to go on with the management of the farm," attaches upon the attainment of the lessee of felony. But at all events it is not a continuing breach. It attaches, if at all, upon the conviction, and may be removed by a subsequent receipt of rent (b).

Where a lease contained an exception out of the demise of all the trees upon the demised premises, and also a proviso, for re-entry if the defendant should commit any *waste in or upon the said demised premises*, it was held to be no forfeiture of the lease, to cut down the trees excepted; for that waste could only be committed of the thing demised, and the trees were excepted out of the demise (c).

A covenant, "not to permit any trade or business whatsoever," to be exercised upon the demised premises, is broken by an assignment to a schoolmaster, who kept his school upon the premises (d).

A covenant that the lessee shall not exercise the trade of a butcher upon the premises, is broken by selling there raw meat by retail, although no beasts were there slaughtered (e).

A covenant not "to use premises for the sale of pork," would, it seems, be broken by exposing carcasses of swine on

(a) Doe d. Lloyd v. Powell, 5 B. 8 East, 190.
& C. 308.

(b) Doe d. Griffith v. Evans, 5 B. & Ad. 765.

(c) Goodright d. Peters v. Vivian, & A. 617.

(d) Doe d. Bish v. Keeling, 1 M. & S. 95.

(e) Doe d. Gaskell v. Spry, 1 B.

the premises, and making bargains there for sale, although the carcasses be taken to other premises to be cut up, and the bills for the meat supplied be made out as from such other premises (a).

A proviso for re-entry if the lessee shall permit any person to inhabit the premises who should carry on certain specified trades, (that of a licensed victualler not being one), *or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants*, is not broken by the opening of a public house (b).

Where a lease contained a covenant "to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office," the covenant was interpreted, by reasonable intendment, to mean insurance against fire; and the lessee, having insured the proper sum, but omitted to pay the annual premium within the time allowed by the office for payment, was held to have forfeited his lease upon a clause of re-entry, although he paid the premium within fourteen days after such time, and no action had been commenced, and no accident had happened by fire to the premises, in the mean time (c). But where, in pursuance of a similar covenant, the lessee effected an insurance (the policy containing a memorandum, that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made

(a) *Doe d. Davis v. Elsam*, 1 M. & M. 189. In this case the proviso was thus worded, that it should be lawful for the lessor to re-enter "if any auction should be had on the premises, *or use them for the sale of pork*," it was objected that these words were ungrammatical and insensible; but it was ruled by Lord Tenterden that the proviso must be considered to have the same effect

as if it had been expressed "in case the premises should be used for the sale of pork."

(b) *Jones v. Thorne*, 1 B. & C. 715.

(c) *Doe d. Pitt v. Sherwin*, 3 Campb. 134; *Doe d. Flower v. Peck*, 1 B. & Ad. 428; *vide Rolfe v. Harris*, and *Reynolds v. Pitt*, 2 Price, 206, 212; and *Bracebridge v. Buckley*, 2 Price, 200.

upon it within three months after his death), and died, and the representative, after the three months had expired, but before ejectment brought, obtained the proper indorsement, Lord Ellenborough, C. J. was of opinion that the policy did not become void for want of the indorsement within the three months, but at most was only rendered voidable at the option of the company, and ruled, that no forfeiture was incurred (a). He also expressed strong doubts of the legality of the proviso on the policy requiring the indorsement, considering that the benefit of the policy enured to the representative, the same being for a definite time.

A covenant in a lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "*reasonable use and wear only excepted*," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded (b); but a covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another; and also by taking away trees, although the lessee plant a greater quantity than he takes away (c).

A lease with a clause of re-entry, for non-performance of covenants, contained a general covenant on the part of the lessee, to keep the premises in repair, and also another independent covenant to repair, within three months after notice; the landlord, after serving the tenant with a notice to repair *forthwith*, was allowed to bring an ejectment within the three months, for a breach of the general covenant to repair (d). But where on similar covenants, and with a similar clause of re-entry, the landlord gave a notice to repair *within the three calendar months* from the date of the notice, it was held that

(a) Doe d. Pitt v. Laming, 4 Campb. 76.

(b) Doe d. Jones v. Crouch, 2 Campb. 449.

(c) Doe d. Wetherell v. Bird, 6 C. & P. 195.

(d) Roe d. Goatley v. Paine, 2 Campb. 520.

he had by such notice precluded himself from insisting on the forfeiture until the expiration of the three months (*a*).

A covenant "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time, and it is for the jury to say, upon the evidence, whether the lessee has done what he reasonably ought in the performance of it (*b*).

A proviso giving power of re-entry, if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of covenant *to repair*, the omission to repair not being *an act done* within the meaning of the proviso (*c*).

A proviso giving power of re-entry if the tenant *make default in performance* of any of the clauses, by the space of thirty days *after notice*, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission, and no forfeiture is incurred by the erection of a portico contrary to such covenant, and a neglect to remove it after notice (*d*).

The breaking of a door-way through the wall of a demised house into an adjoining house, and keeping it open for a long space of time, has been held to amount to a breach of covenant to repair (*e*). So also pulling down a brick wall dividing two court-yards, has been held a breach of covenant "to repair and maintain the brick walls, &c." (*f*); but where the covenant was "to repair and keep in repair the premises, and *also such*

(*a*) Doe d. Morecraft v. Meux, 4 B. & C. 606; *vide* Doe d. Rankin v. Brindley, 4 B. & A. 84.

(*b*) Doe d. Pitman v. Sutton, 9 C. & P. 706.

(*c*) Doe d. Abdy v. Stevens, 3 B. & Ad. 299.

(*d*) Doe d. Palk v. Marchetti, 1 B. & Ad. 715.

(*e*) Doe d. Vickery v. Jackson, 2 Stark. 293.

(*f*) Doe d. Witherell v. Bird, 6 C. & P. 195.

buildings, improvements, and additions as should be made thereon by the lessee," it was held, that no forfeiture was incurred by changing the lower windows into shop windows, stopping up a door-way, and making a new one in a different place; the covenant being only against *non-repair*, and it being implied by the terms of the lease, that additions or improvements were to be made (a).

Where a lease contained a general covenant to repair, and a further covenant that if the lessee did not repair after notice, the lessor might enter and do the repairs himself, with right of distress for the amount of such repairs, and the lease also contained a proviso for re-entry upon breach of any covenant, and the lessor gave the lessee notice to repair the premises within the period given by the lease, and that if he the lessee did not repair within such period, he the lessor would perform the repairs, and charge the lessee with the expense, and the premises were not in fact repaired by either party; it was held, that the lessor having elected to perform the repairs, and charge the lessee with the expense, could not proceed to recover the premises as on a forfeiture (b).

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10*l.* and the tenant pulled down some old buildings of more than 10*l.* value, and substituted others of a different description; it was held that the waste contemplated in the proviso *was waste producing an injury to the reversion*; and that it was a question for the jury whether *such waste* had been committed (c).

A covenant for a landlord to be allowed to come into a house to see the state of repair at "convenient times," is not broken

(a) Doe d. Dalton v. Jones, 4 B. Ad. & Ell. 277.
& Ad. 126.

(b) Doe d. De Rutzen v. Lewis, 5 Bond, 5 B. & C. 855.

(c) Doe d. Earl of Darlington v.

by his not being allowed to go into some of the rooms, if the tenant had no previous notice of his coming (a).

Where a lease contained a covenant that the lessee should not assign without leave, after which covenant was a proviso, that if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee, should be broken, it should be lawful for the lessor to re-enter, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, should quietly enjoy; it was held that the lessor could not re-enter for breach of the covenant not to assign, the proviso being restrained by the word "*thereinafter*" to subsequent covenants, and although there were none such, yet the Court could not reject the word (b).

But where the lease contained a proviso, that the tenant should not carry any hay, &c., off the premises, under a certain penalty, and a clause followed, enumerating all the covenants except the above, and provided that upon breach of any of the covenants the lessor might re-enter; it was held, notwithstanding the penalty and the omission of the covenant in the enumeration, the clause of re-entry applied (c).

Where a beneficial long lease reserved to the lessee the liberty to cut down and dispose of all timber, &c., subject to a proviso, that *when and so often as* the lessee should intend, during the term, to fell timber, &c. he should give notice in writing to the lessor, who should thereupon have the option of purchasing it, with a power of re-entry, in case of a breach of

(a) Doe d. Wetherell v. Bird, 6 M. & S. 265.
C. & P. 195.

(b) Doe d. Spencer v. Godwin, 4 B. & Ad. 402.

(c) Doe d. Antrobus v. Jepson, 3

this proviso, and the lessee soon after the execution of the lease, (at that time intending *bonâ fide* to cut down the whole of the then growing timber,) gave the proper notice in writing to the lessor, who did not accept the purchase, but disclaimed it; the lease was not forfeited, although the lessee did not forthwith fell all the timber, &c., but proceeded to cut down the same in different seasons at his own convenience, without giving any fresh notices to the lessor or his assignee, to whom he had, previously to the last cuttings, conveyed his interest (a).

Where a lease of certain waggon-ways was granted to *A. B.* by an act of Parliament, in which, as well as in the lease, there was a proviso for re-entry, in case of neglect in any one year *to bring a certain number of coals to C.*, for the use of the inhabitants of *L.*, and sell them there at a certain price; and by a subsequent act, the preamble of which recited that the price was inadequate, and that the inhabitants of *L.* would sustain great inconvenience if *A. B.* ceased to supply them with coals, it was enacted, first, that the former act, confirming the lease, (except such parts as were thereby altered or repealed,) should continue; then that *A. B.* might sell his coals brought to and deposited at *C.*, *or at any other place near thereto, to be used as a repository for coals instead thereof*, at a certain increased price; and another section provided, that if *A. B.* neglected to bring the stipulated quantity of coals to *C.*, *or to such other place near thereto, to be used as a repository for coals instead thereof*, and sell them there at the price fixed by the act, his interest in the waggon-ways should cease: it was held, that although the preamble did not recite an intention to give *A. B.* the liberty to change the place used as a

(a) Goodtitle d. Luxmore v. Saville, 16 East, 87; Lord Ellenborough, C. J. and Le Blanc, J. intimated an opinion, that a Court

of Equity would probably, under the circumstances, give the lessor or his assignee a new option to purchase.

repository for coals, and although it was not expressly enacted that he might do so, yet that the intention of the Legislature to give him that privilege was clear, and that he might do so without forfeiting his interest in the waggon-ways; because, in construing acts of Parliament, the Court must take into consideration, not only the language of the preamble, or of any particular clause, but of the whole act; and if in some of the enacting clauses expressions are found of more extensive import than in others, or than in the preamble, the Court will give effect to those more extensive expressions, if upon a view of the whole act, it appears to have been the intention of the Legislature that they should have effect (*a*).

In all the cases above-mentioned, the tenancy was created by deed; but the principle is the same if the tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them (*b*).

By a memorandum of agreement, in consideration of the rent and *conditions* therein after-mentioned, *A.* was to have, hold, and occupy as on lease, certain premises therein specified, at a certain rent per acre. And it was *stipulated*, that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that *A.* should take at the rent aforesaid, certain other parcels, as the same might fall in; and lastly, it was *stipulated and conditioned* that *A.* should not assign, transfer, or under-let, any part of the said lands and premises otherwise than to his wife, child, or children; it was held, that by the last clause a *condition* was created, for the breach of which the lessor might maintain an ejectment (*c*).

(*a*) Doe d. Bywater v. Brandling, 6 Esp. 106.
7 B. & C. 643. (*c*) Doe d. Henniker v. Watt, 8
(*b*) Doe d. Oldershaw v. Breach, B. & C. 308.

But in an agreement to let, in which there was no clause of entry, the following stipulation was held to be a covenant, and not a condition operating in defeasance of the estate: "It is also hereby agreed, and clearly understood, that in case the said *A. W.* or his heirs, &c., should want any part of the said land to build or otherwise, or cause to be built, then the said *T. R.*, or his heirs, &c., shall and will give up that part or parts of the said lands as shall be requested by the said *A. W.*, by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do" (a).

Next, of the parties who may take advantage by forfeiture of the breach of a covenant or condition.

To enable a reversioner (b) to take advantage of a forfeiture, it is necessary that he should have the same estate in the lands at the time of the breach, as he had when the condition was created; and extinguishment of the estate in reversion, in respect of which the condition was made, extinguishing the condition also (c). Thus, where a lease was made for a hundred years, and the lessee made an under-lease for twenty years, rendering rent, with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; it was holden that the grantee should not have either the rent, or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee (d).

The reversioner must also be entitled to the reversion, at the

(a) *Doe d. Wilson v. Phillips*, 2 Bing. 13. sue, *vide ante*, 53.

(c) *Dumpor's case*, 4 Co. 120, (b).

(b) For covenants upon which the assignee of a reversion may (d) *Thre'r v. Barton*, Moore, 94; *Webb v. Russell*, 3 T. R. 393, 402.

time the forfeiture is committed, or he cannot take advantage of it (*a*).

When the condition is, that the lessee will not do any particular act without leave from his lessor, if leave be once granted, the condition is gone for ever; for the condition is to be taken strictly, and by the license it is satisfied. (*b*). And, in like manner, when a condition is entire, a license to dispense with a part of the condition is a dispensation of the whole. Thus, where a lease was made to three, on condition that neither they, nor any of them, should alien without license of the lessor, and the one by license aliened his part, and afterwards the other two without license aliened their parts, it was adjudged the lessor could not enter, for the condition was dispensed with (*b*). So likewise, where the lease contains a clause, that the lessee shall not assign without leave from his lessor, the lessee, under a license to assign part of the premises, may assign the whole without incurring a forfeiture (*c*). But the license must be such as is required by the lease; and therefore, where the lease required the license to be in writing, a parol license was held to be insufficient (*c*).

Provisoes for re-entry are also construed strictly with respect to the parties who may take advantage of them, and only include the persons who are expressly named. Thus, a power for *C.* to enter will not extend to his executor (*d*). And it seems also, that if a lessee covenant with his lessor that *he* will not assign, &c., a covenant so framed will not extend to his executors or administrators, although if the executors or administrators be mentioned in the clause, they will be bound by it (*d*).

(*a*) Fenn d. Matthews v. Smart, 12 East, 444.

(*b*) Dumpor v. Syms, Cro. Eliz. 815; S. C. 4 Co. 119, (*b*).

(*c*) Roe d. Gregson v. Harrison,

2 T. R. 425; Seers v. Hind, 1 Ves. jun. 294.

(*d*) Hassel d. Hodson v. Gouthwaite, Willes, 500.

So also, where a lease contained a covenant that the lessee, his executors or administrators (without mentioning *assigns*) should not under-let, and the lessee became bankrupt, and his assignees assigned the premises to a third person, who re-assigned to the bankrupt, (having obtained his certificate,) who under-let them; it was held that the lessee having been discharged of all his covenants by his bankruptcy, the under-letting by him was in the character of assignee, and therefore no forfeiture of the lease (*a*).

When a power of re-entry for breach of covenants is reserved, and a lease and the possession descends to co-parceners at common law, it seems that one alone cannot maintain ejectment for breach of the covenant (*b*).

Where directors of a Joint Stock Company granted a lease with a power of re-entry, and subsequently the company was incorporated by an act of Parliament, enacting, "that all contracts, &c. therefore entered into with the directors of the company, should be as valid and effectual to all intents and purposes, as if the company had been incorporated, when the same contracts, &c., were entered into, and as if the same had been entered into by the incorporated company;" it was held that the right of re-entry was transferred to the incorporated company (*c*).

A power of re-entry cannot be reserved to a stranger; (*d*) and where, in a building lease, a trustee and his *cestui que trust* were both demising parties, and the power of re-entry was reserved to both, and the state of the title appeared in the recitals in the lease, the Court, without argument, held the proviso to be void (*e*).

(*a*) Doe d. Chere v. Smith, 1 v. Knebell, 2 M. & Rob. 66.
Mars. 359.

(*d*) Co. Litt. 214.

(*b*) Doe d. De Rutzen v. Lewis,
5 Ad. & Ell. 277.

(*e*) Doe d. Barber v. Lawrence,
4 Taunt. 23.

(*c*) Doe d. London Dock Comp.

So where a lease was made by a mortgagee, and the executrix of a mortgagor, and the mortgagee demised, and the executrix demised and confirmed, and a right of entry for breach of covenants was reserved "to them or either of them," it was held, that this lease operated as the demise of the mortgagee, and the confirmation of the executrix, and that the right of re-entry under the proviso enured to the mortgagee only (a).

So also, where a leasehold was bequeathed to *A.* in trust, to permit or suffer *B.* to take the rents during her life, and on her death to sell and divide the produce between *C.* and *D.*, and *A.*, *B.*, and *C.* joined in a lease to *D.*, of the residue of the term, with a right of re-entry reserved to *A.*, *B.*, and *C.* and the survivors of them; it was held, that *B.* could not take advantage after *A.*'s death of the right of entry, she being a stranger to the legal estate (b).

But where a lessee made an under lease containing a proviso that the lessor *and* lessee might re-enter for breach of covenant, it was held that the lessee might *alone* maintain ejectment without joining the lessor (c).

And where a party, being possessed of a term of years, demised his whole interest subject to a right of re-entry on the breach of a condition, it was held that he might enter for condition broken, although he had no reversion (d).

The forfeiture of a lease by breach of a covenant or condition may be waived, in like manner as a forfeiture for non-payment of rent, or a notice to quit; that is to say, if the landlord do any act, with knowledge of the breach which can be considered as an acknowledgment of a tenancy still subsisting.

(a) Doe d. Barney v. Adams, 2 Tyr. 289.

(b) Doe d. Parker v. Goldsmith, 2 Tyr. 710.

(c) Doe d. Bedford v. Wheeler, 4 Bing. 276.

(d) Doe d. Freeman v. Bateman, 2 B. & A. 158.

Thus for example, if he receives rent accruing subsequently to the forfeiture (*a*), unaccompanied by circumstances which shew a contrary intention (*b*). It seems also, that an absolute unqualified demand for rent will of itself be sufficient, although the rent should not be paid (*c*), and it has been ruled at Nisi Prius, that a notice to quit will operate as a waiver of a forfeiture for non-repair until after its expiration (*d*). Acceptance also of rent accruing due after the lessee has been discharged under the Insolvent Debtors' Act, has been held a waiver of a forfeiture accruing by reason of his previous insolvency (*e*), and although it cannot be correctly termed a waiver of a forfeiture, it has been holden, that a lessor cannot take advantage of a forfeiture against a person, who has purchased the lease subsequent to the breach under the lessor's advice (*f*).

But a waiver of one forfeiture incurred by breach of covenant, will not be a waiver of a second forfeiture incurred by another breach of the same covenant; nor where the breach is a *continuing* breach, will the landlord be precluded from taking advantage of it, by having received rent, &c. after the breach was originally committed. Thus where a right of re-entry was reserved on a breach of covenant not to underlet, it was held that the lessor was entitled to re-enter upon a second underletting, although he had waived his right so to do upon the first. So also where the forfeiture incurred was by using rooms in a house in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord might recover after receiving rent, provided the user continued after such receipt. So also where a lease of coal-mines reserved a certain rent, and contained a proviso that the

(*a*) Fox v. Swan, Styles, 482; Goodright d. Walter v. Davids, Cowp. 803; Doe d. Griffith v. Pritchard, 5 B. & Ad. 765.

(*b*) *Ante*, 111.

(*c*) Doe d. Nash v. Birch, 1 M. & W. 402.

(*d*) Doe d. Scott v. Miller, 2 C. & P. 348. The authority of this case, as reported, may be doubtful.

(*e*) Doe d. Gatehouse v. Rees, 4 Bing. N. C. 384.

(*f*) Doe d. Sore v. Eykins, 1 C. & P. 154; S. C. 1 M. & M. 29.

lease should be void if the tenant should cease working at any time two years, and the tenant did cease working two years, and then paid rent, but did not resume the working; it was held that this was a continuing breach, and that ejectment might be maintained, for the ceasing to work after the payment of the rent (*a*). So also a proviso for re-entry, "in case the tenant shall become a bankrupt, or be insolvent," means as to the latter clause a general inability to pay debts, and not taking the benefit of the Insolvent Debtors' Act, and such inability will be a continuing breach, until the party shall be discharged of his debts by that act (*b*). The breach of a covenant also "to insure and keep insured the demised premises during the term," is a continuing breach for such portion of time as they shall remain uninsured (*c*).

But in a case where a lease contained a covenant to repair, with a right of re-entry, in case the lessee should not repair within three months after notice, and the landlord gave notice, and after the three months had expired, received rent accruing after such expiration, and then brought an ejectment, the premises continuing out of repair, and the jury found a verdict for the defendant, the Court of King's Bench refused to set the verdict aside, notwithstanding the opinion of Lord Kenyon, as expressed on the trial, that the forfeiture had not been waived. And it seems the jury were right, for the power to re-enter was not given for breach of the general covenant to repair, but "in case the lessee should not repair within three months after notice;" the receipt of rent therefore after the expiration of the notice to repair was a waiver of that notice, and consequently a fresh notice was necessary to bring the party within the penalty of the proviso (*d*).

(*a*) Doe d. Bryan v. Banks, 4 B. & A. 401.

(*b*) Doe d. Gatehouse v. Rees, 4 Bing. N. C. 384, and the cases there cited.

(*c*) Doe d. Flower v. Peck, 1 B. & Ad. 428.

(*d*) Fryett d. Harris v. Jeffreys, 1 Esp. 393.

Where the defendant being the mortgagee of a term, purchased the mortgagor's whole interest in the premises, in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the non-completion of the buildings; it was held, that the lessor's right of re-entry was not thereby waived, but suspended only for such reasonable time after the purchase, as might be required to complete the buildings, and that ejectment might be maintained for the forfeiture after that time had elapsed, against the purchaser, who had proceeded in part to finish, but had never wholly completed the buildings, or put them in a habitable state (*a*).

A lease contained a covenant by the lessee, to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises. Both parts of the lease continued in the possession of the lessor, and an abstract only was delivered to the lessee, in which it was stated, that the tenant was to insure in two-thirds of the value, but it was not stated in whose names the policy was to be effected. The lessee insured in his own name only, and to a less amount than two-thirds, but to the same amount as the lessor had himself insured the premises during two years of the lease, when the lessee had been in embarrassed circumstances. Lord Tenterden, C. J. ruled that although there was no dispensation or release from the covenant, yet that if the conduct of the lessor had been such as to induce a cautious man to believe, that he would do all that was required of him, by insuring in his own name, and to the amount proved, he could not proceed against his lessee for a forfeiture; and he left to the consideration of the jury, the question whether such had been the conduct of the lessor: the jury found a verdict for the defendant (*b*).

(*a*) *Doe d. Sore v. Ekins*, 1 R. & M. 29; S. C. 1 C. & P. 154.

(*b*) *Doe d. Knight v. Rowe*, 1 R. & M. 343.

A landlord will not lose his right to re-enter, by merely lying by, (however long the period), and witnessing the act of forfeiture; but it seems, that if with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver, as well as ground for application to a Court of Equity for relief (a).

It seems scarcely necessary to observe, that no act of the landlord will operate as a confirmation of a lease, rendered voidable by a breach of covenant, unless he had full notice, at the time of such act, that the forfeiture had been committed (b).

Before quitting this branch of our subject, it is necessary to notice a material distinction which prevails between leases for *lives* and leases for *years*, as to the consequences of a forfeiture upon the breach of a condition, where the lease is declared "*to be null and void*," or "*to cease and determine*," &c. upon the breach of the condition, instead of being expressed in the common form, "*that it shall and may be lawful for the lessor, in such case, to re-enter*." In leases for lives, whatever may be the words of the condition, it is in all cases held, that if the tenant be guilty of any breach of it, the lease is voidable only, and not void; and therefore not determined until the lessor re-enters. Because when an estate commences *by livery*, it cannot be determined before *entry*; and consequently, if the lessor do any act which amounts to a dispensation of the breach, the lease, which before was voidable only, is thereby affirmed, and the forfeiture waived. But when a condition of the import of those first above-mentioned is inserted in a lease for years, if the lessee be guilty of any

(a) Doe d. Sheppard v. Allen, 3 Taunt. 78.

(b) Roe d. Gregson v. Harrison, 2 T. R. 425.

breach of it, the lease becomes absolutely void, and determined thereby; and cannot be again set up by any subsequent act of the lessor. But if the condition be "*that it shall and may be lawful for the lessor to re-enter,*" or "*that the terms shall cease and determine, if the lessor please*" (a), or the like, the lease will be only voidable by a breach of the condition; and the forfeiture may be waived by a subsequent acknowledgment of a tenancy, in the same manner as in all cases of leases for lives (b).

These distinctions however do not exist, when the forfeiture accrues by reason of non-performance of a covenant, instead of the breach of a condition. In all cases of this nature, whatever may be the words of the proviso, leases for lives and leases for years are governed by the same principles, and a forfeiture may be enforced, or the lease confirmed, at the option of the lessor (c).

A proviso in a lease to re-enter for a condition broken, operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease for ninety-nine years, if *A.* and *B.* should so long live, was granted, with a proviso, giving the power of re-entry, in case the lessee should underlet the premises for the purpose of tillage, and an under-tenant of the lessee ploughed up and sowed the land, but the lessor did not enter during the continuance of the estate; it was held in an action of trespass by the lessor against the under-tenant, for entering upon the land, after the determination of the estate, for the purpose of carrying off the emblements, that the plaintiff having never been in possession

(a) *Doe d. Bristow v. Old*, K. B. Sittings after T. T. 1814, MS.

(b) *Co. Litt.* 215, (a); *Pennant's case*, 3 *Co.* 64, 65.

(c) *Rede v. Farr*, 6 *M. & S.* 121;

Doe d. Bryan v. Bancks, 4 *B. & A.* 401; *Arnsby v. Woodward*, 6 *B. & C.* 519; *Doe d. Nash v. Birch*, 1 *M. & W.* 402.

by *right of re-entry* for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements (*a*).

The Courts of Common Law have no power to stay proceedings in ejectment on a forfeiture by breach of covenant to repair, or indeed by the breach of any other covenant except a covenant for the payment of rent; and the rule in equity is, that relief will only be granted in those cases in which the forfeiture is incurred by the non-payment of a sum of money, so that payment of that sum with interest is a complete compensation, and will put the party in the same situation as if there had been no breach; but that relief will not be granted (unless perhaps in the case of unavoidable ignorance or accident) in respect of covenants for repairing, insuring, or doing any specific acts, where the compensation must be estimated in damages (*b*).

(*a*) *Johns v. Whitley*, 3 Wils. 127. Ves., jun. 134; *ex parte Vaughan*, 1 Turn. & Russ. 435; *Green v.*

(*b*) *Doe d. Mayhew v. Asby*, 10 Ad. & Ell. 71; *Hill v. Barclay*, 18 Ves., jun. 63; *Reynolds v. Pitt*, 19 Bridges, 4 Sim. 100; *Harris v. Bryant*, 4 Russ. 91.

CHAPTER V.

Of the Ancient Practice: and the Cases in which it is still necessary.

WHEN the remedy by ejectment is pursued in an inferior Court, the fictions of the modern system are inapplicable, for inferior Courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them. When also the premises are vacated, and wholly deserted by the tenant, and his place of residence is unknown, the modern practice, which requires an affidavit of the service of a declaration in ejectment upon the tenant in possession, before judgment can be obtained against the casual ejector cannot be adopted. But strict proof of these facts will be required, and if it appear that the premises were not *wholly* deserted, or that the plaintiff's lessor knew *where the tenant lived*, a judgment obtained by means of the ancient practice will be set aside (*a*).

When, therefore, the party brings his action in a superior Court, the possession being vacant (*b*), and the lessor's abode unknown, and when he is desirous of trying his title in a Court of inferior jurisdiction, (but in these cases only) all the forms of the ancient practice must be observed: a lease must be sealed upon the premises; an ouster actually made; and the parties to the suit will be real, and not imaginary persons.

The proceedings are as follows. *A.* the party claiming title,

(*a*) *Savage v. Dent*, Stran. 1064; 464.
Jones d. Griffiths v. March, 4 T. R. (*b*) Appendix, No. 7.

enters upon the land before the first day of the Term of which the declaration is to be entitled, either in person or by attorney (*a*); and whilst on the premises, execute a lease of them to *B.* (any person (*b*) who may accompany him,) and delivers to him the possession by some one of the common modes. *C.* (some other person) then enters upon the premises, and ejects *B.* therefrom, and having done so, remains upon them, whilst *B.* delivers to him a declaration in ejectment, founded upon the demise contained in the lease, and in all respects like the declaration in the modern proceedings (*c*), except that the parties to it are real instead of fictitious persons; *B.* being made the plaintiff, *A.* the lessor, and *C.* the defendant. To this declaration a notice is added, signed by *B.*'s attorney, and addressed to *C.*, requiring him to appear and plead to the declaration, and informing him that if he do not, judgment will be signed against him by default (*d*).

The suit then proceeds as against the casual ejector, and if the action be brought in a superior Court, no person claiming title will be admitted as defendant in his stead. Assuming therefore, the right to the premises to be disputed, the party sealing the lease must, in the first instance, recover the possession, and the party claiming title, must afterwards bring a common ejectment against him to try his right (*e*).

When the proceedings are in the Queen's Bench, judgment

(*a*) If it be necessary to join the wife in the demise, the lease must be executed by the parties, in their proper persons, because a *feme covert* cannot constitute an attorney; *Wilson v. Rich*, 1 Yelv. 1; *S. C.* 1 Brown, 134; *Plomer v. Hockhead*, 2 Brown, 248; *S. C.* Noy. 133; *sed vide* *Hopkins's case*, Cro. Car. 165; *Gardiner v. Norman*, Cro Jac. 617.

(*b*) Attornies form an exception to this statement; for, by the rules of B. R. and C. B. (M. T. 1654), it is ordered, "that for the prevention and maintenance and brocage, no attorney shall be lessee in an ejectment."

(*c*) Appendix, No. 12.

(*d*) Appendix, No. 8.

(*e*) *Ex parte* *Beauchamp and Burt*, Barn. 177, B. N. P. 96.

is moved for against the defendant, upon an affidavit (*a*) of the sealing of the lease, ouster of the plaintiff, &c., as in a common ejectment (*b*), and unless he appears and pleads, judgment will be signed against him accordingly. In the Common Pleas, a rule to plead must be given on the first day of Term, as in other actions, and judgment signed at the expiration of the rule (*c*).

It is immaterial, as far as the forms of sealing the lease, &c. are concerned, whether the action be commenced in a superior, or inferior Court: but the subsequent proceedings in inferior Courts must of course depend upon the general practice in them in other actions, and cannot form a part of this Treatise. How far it may even be *necessary* to give the tenant in possession notice of the claimant's proceedings, in an ejectment brought in an inferior Court, may appear doubtful, when it is remembered, that such notice was only requisite in the superior Courts, in consequence of a rule made for that particular purpose (*d*); but it certainly is more *prudent* to conform to the general practice in this respect, and the notice need not to be given until after the entry, and execution of the lease (*e*).

The defendant is entitled to remove an ejectment from an inferior to a superior Court, either by writ of *certiorari* (*f*), or *habeas corpus* (*g*); and when removed, the tenant in possession is entitled to the same privilege of confesing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior Court (*h*). The superior

(*a*) Appendix, No. 9.

(*b*) *Smartley v. Henden*, 1 Salk. 255, 2 Sell. Prac. 131.

(*c*) 2 Sell. Prac. 131.

(*d*) *Ante*, 11.

(*e*) 1 Lill. Pr. Reg. 675.

(*f*) *Doe d. Sadler v. Dring*, 1 B. & C. 253.

(*g*) *Highmore v. Barlow*, Barn. 421; *Allen v. Foreman*, 1 Sid. 313, but a judgment in ejectment is not within the meaning of 19 Geo. III. c. 70, s. 11; *Doe d. Stanfield v. Shipley*, 2 Dow. P. C. 408.

(*h*) *Gilb. Eject.* 37.

Court also will not grant a *procedendo* when a cause has been so removed, if there be reason for believing that an impartial trial cannot be had in the inferior Court, or upon other special grounds; and it is to be inferred from the reasoning of the Judges in the only modern case upon the subject, that a writ of *certiorari* is a matter of course, and that a *procedendo* will in no case be granted (a).

When the lands lie partly within, and partly without, the jurisdiction of the inferior Court, the defendant cannot plead above the jurisdiction of such inferior Court, because the demise is transitory, and may be tried anywhere (b).

As the plaintiff, in the ancient practice, is a person actually in existence, his death would of course abate the action, according to the general rules of law; but as the Courts look upon the lessor of the plaintiff to be the person concerned in interest, they will not suffer him to be deprived of his remedy, by such an event. If, therefore, there be any one of the same name with the plaintiff, he will be presumed to have been the person; and it has also been held to be a contempt of the Court, to assign for error the nominal plaintiff's death (c).

In like manner, before the introduction of the modern practice, it was said, that if the plaintiff released to one of the tenants in possession, who had been made defendant, such release would be a good bar, because the plaintiff could not recover against his own release, since he was the plaintiff upon the record; but the Courts considered such a release as a contempt, and it does not appear that a plea of this nature ever occurred in practice (d).

(a) Patterson d. Gradridge v. Eades, 3 B. & C. 550.

(b) Hall v. Hughes, 2 Keb. 69.

(c) Addison v. Sir John Otway, 1 Mod. 250, 52; Moore v. Good-

right, Stran. 899.

(d) Peto v. Checny, 2 Brown, 128; Anon. Salk. 260; vide Doe d. Byne v. Brewer, 4 M. & S. 300.

The casual ejector is also in the ancient practice a real person, but the Court will not allow him to confess judgment; and where, upon proceedings on a vacant possession, the casual ejector gave a warrant of attorney for this purpose, the Court set the judgment aside (*a*).

Where an action of ejectment, and an action of assault and battery, were joined in the same writ, after verdict it was moved in arrest of judgment, because it was without precedent; but the Court seemed to think the misjoinder cured by the verdict (*b*).

(*a*) *Hooper v. Dale*, Stran. 531.

(*b*) *Bird v. Snell*, Hob. 249; *et vide*, Gilb. Eject. 52.

CHAPTER VI.

Of the Declaration in the modern Action of Ejectment, and Notice to Appear.

THE practical proceedings in the modern action of ejectment vary from the proceedings in all other actions. The suit is commenced by the delivery of the declaration against the casual ejector, to the tenant in possession; for, as the plaintiff and defendant are only fictitious persons, the suing out of a writ would be an useless form. This declaration is, in fact, in itself, a kind of writ or process, and is so considered by the Courts; and it is the only means by which the party in possession is informed of the claim set up by the lessor, and required to appear and defend his title (*a*).

OF THE DECLARATION.

We must now consider in their order—Firstly, the several requisites of the declaration. Secondly, the amending the declaration. Thirdly, the notice to appear.

The rules of Michaelmas Term, 3 Wm. IV., being rules “agreed upon by the Judges in pursuance of the stat. 2 Wm. IV. c. 39,” which relates to *personal* actions only, do not extend to the action of ejectment, which is a *mixed* action, and therefore the old forms of intituling and commencing the declaration should be observed (*b*).

OF ENTITLING THE DECLARATION.

The declaration should regularly be entitled of the Term

- (*a*) *Rex v. Unitt*, Stran. 567. 1 Ad. & Ell. 11; *Doe d. Gillett v.*
 (*b*) *Doe d. Fry v. Roe*, 3 M. & *Roe*, 2 Dow. P. C. 690.
Scott, 370; *Doe d. Evans v. Roe*,

immediately preceding the Vacation in which it is delivered; but if it should be entitled of a wrong Term, or a Term not arrived (*a*), or not of any Term, it seems from the majority of the cases to be immaterial, provided the notice to appear at the foot of the declaration was sufficient to give the tenant due warning of the time for his appearance.

Thus declarations have been upheld entitled Michaelmas Term, "54 Geo. III.," instead of "55 Geo. III." (*b*); Trinity Term, "56 Geo. III.," instead of "55 Geo. III.," (*c*); Michaelmas Term, "8 Wm. IV.," instead of "7 Wm. IV.," Trinity Term "6 Wm. IV.," instead of "5 Wm. IV." (*b*). "Hilary" instead of "Michaelmas" Term (*d*), and "Michaelmas" instead of "Easter" Term (*e*), the notices to appear being correct, and the declarations delivered at the proper times. So also "In the Common Pleas, June 12, 1834" (*f*); and where the declaration was delivered before the first day of "Hilary" Term, and the notice at its foot was dated "January 1, 1818," and was to appear within the four first days of the next Term, it was held sufficiently certain, although not entitled at all (*g*).

On the contrary, a declaration entitled Trinity Term, "4th Vict." instead of "3rd Vict." has been held insufficient, although it was sworn that the service was effected on the 29th of October, with notice to appear in the next Michaelmas Term (*h*). So also a declaration entitled "6 Wm. IV." in-

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| (<i>a</i>) Doe d. Gore <i>v.</i> Ross, 3 Dow. P. C. 5; Doe d. Willes <i>v.</i> Roe, 5 Dow. P. C. 380; Doe <i>v.</i> Roe, 2 Dow. P. C. 186; Doe d. Smithers <i>v.</i> Roe, 4 Dow. P. C. 374; Doe d. Brook <i>v.</i> Roe, 9 Dow. P. C. 347; Doe d. Evans <i>v.</i> Roe, 5 Dow. P. C. 508; Doe d. Crooks <i>v.</i> Roe, 6 Dow. P. C. 184. | 2 Chitty, 172. |
| (<i>b</i>) Goodtitle d. Ranger <i>v.</i> Roe, | (<i>c</i>) Doe <i>v.</i> Greaves, 2 Chitty, 172. |
| | (<i>d</i>) Anon. 2 Chitty, 172. |
| | (<i>e</i>) Anon. 2 Chitty, 173. |
| | (<i>f</i>) Doe d. Ashman <i>v.</i> Roe, 1 Bing. N. C. 253. |
| | (<i>g</i>) Goodtitle d. Price <i>v.</i> Badtitle, H. T. 1818, C. B., MS. |
| | (<i>h</i>) Doe d. Vincent <i>v.</i> Roe, 9 |

stead of "7 Wm. IV." (*a*). So also a declaration entitled "Michaelmas Term, 1840," with a notice to appear in "next Michaelmas Term," and which declaration was served before the commencement of the Term, on which occasion the tenant said, he knew no step could be taken until March (*b*).

If the declaration be irregularly entitled, and the notice to appear does not demonstrate the time for appearance with sufficient certainty, as where the declaration was entitled of a Term not arrived, and there was no date to the notice (*c*), it seems, upon principle, that such declaration ought not to be supported; but it has been ruled both ways (*c*).

The omission of the name of the Court on intitling the declaration is immaterial, if the notice at the foot gives the required information (*d*); it is also immaterial whether the declaration be filled in with the name of the casual ejector or the tenant in possession, except that in the latter case the Court will not give a rule absolute for judgment in the first instance (*e*).

With the exception of cases in which the ejectment is founded upon the provisions of the stat. 1 Wm. IV. c. 70, s. 36, when the declaration must be specially entitled of the day next after the day of the demise, whether the same shall be in Term or Vacation the declaration may be entitled of a Term anterior to such demise, that is to say (inasmuch as the demise is the title upon which the plaintiff is supposed to enter, and the ouster the supposed wrong for which the action is

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| Dow. P. C. 43; Doe d. Pearson v. Roe, 1 Wol. P. C. 58; Doe d. Rogers v. Roe, 2 Dow. N. S. 392. | P. C. 579; Doe d. Newman v. Roe, 9 Dow. P. C. 131; <i>per contra</i> , Anon. 2 Chitty, 172; Doe d. Green v. Roe, 8 Scott, 385. |
| (<i>a</i>) Doe d. Gowland v. Roe, 5 Dow. P. C. 273. | (<i>d</i>) Doe d. Tattersall v. Roe, 8 Dow. P. C. 612. |
| (<i>b</i>) Doe d. Channell v. Roe, 9 Dow. P. C. 67. | (<i>e</i>) Doe d. Dickenson v. Roe, 9 Dow. 363. |
| (<i>c</i>) Doe d. Giles v. Roe, 7 Dow. | |

brought), the declaration may be entitled antecedently to the cause of action. This anomaly springs out of the fictitious nature of the proceedings, and the controul which the Courts exercise over them. If the tenant appear, according to the requisition of the notice, and apply to be admitted a defendant instead of the casual ejector, he will be compelled by the consent rule to accept a declaration as will be explained hereafter (a), entitled of a subsequent Term; and if he leave the suit undefended, judgment will as of course be taken out against the casual ejector (b).

Although the rules of Michaelmas Term 3 & 4 Wm. IV. do not apply to actions of ejectment, the omission when the action is in the Exchequer, of the statement that the plaintiff is indebted to our Lady the Queen and of the *quo minus* is immaterial (c).

OF THE VENUE.

The *venue* in ejectment is local, and must be laid in the county in which the lands are situated (d), and if it appears on the trial, that they are situated in a different county from that stated in the declaration, the plaintiff will be nonsuited. But if the venue stated in the body of the declaration be correct, it has been holden by Patteson, J., that a mistake in the *venue* in the margin is unimportant (e).

OF THE DEMISE.

There is no limitation to the number of demises which may be inserted in the declaration in ejectment, but it must be remembered that it is not the claimant but the nominal plaintiff who is the plaintiff upon the record, and therefore although

(a) *Post*, Chap. 8.

P. C. 388.

(b) Imp. K. B. 642; 1 Lil. Prac. Reg. 680; Tunstall v. Brend, 2 Vent. 174.

(d) Anon. 6 Mod. 222; Mostyn v. Fabrigas, Cowp. 161, 176.

(c) Doed. Bloxam v. Roe, 6 Dow.

(e) Doe d. Goodwin v. Roe, 3 Dow. P. C. 323.

the lessors may have separate interests, they cannot be separately heard at the trial (a).

The demise declared upon, must be consistent with the title of the lessor ; that is to say, such a demise must be supposed to be made, as would, if actually made, have transferred the right of possession to the lessee. Thus, if there be several lessors, and a joint demise by them all be alleged, such a title must be shown, as would enable each of them to demise the whole ; because if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them. As, where *A.* was tenant for life, and *B.* had the remainder in fee, and they made a lease to *C.*, and declared upon the lease as a *joint demise*, it was held bad ; because, during *A.*'s life, it was the lease of *A.*, and the confirmation of *B.*, and after the death of *A.*, it was the lease of *B.*, and the confirmation of *A.*, but not a joint demise (b).

Joint tenants, or coparceners, have a sufficient interest in the lands held in joint tenancy, or parcenery, to entitle them to make a joint demise of the whole premises, but tenants in common have not ; and the reason for this difference seems to be, that tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also ; whilst joint tenants and parceners are seised *per my et per tout*, derive by one and the same title, have a *joint* possession, and must join in any action for an injury thereto ; so that each of them may properly be said to demise the whole (c).

In a case of a joint demise by two tenants in common, where

(a) *Doe d. Fox v. Bromley*, 6 D. 726 ; *Mantle v. Wollington*, Cro. Jac. 166 ; *Morris v. Barry*, 1 Wils. & R. 292.

(b) *King v. Bery*, Poph. 57 ; 1 ; *Heatherly d. Worthington v. Treport's case*, 6 Co. 75, (b). *Weston*, 2 Wils. 232 ; *Doe d. Blight v. Pett*, 11 Ad. & Ell. 842 ;

(c) *Moore v. Fursden*, 1 Show. 342 ; *Millener v. Robinson*, Moore, 682 ; *Boner v. Juner*, Ld. Raym. Doe d. Poole v. Errington, 1 Ad. & Ell. 750.

the Judge at *nisi prius* refused to amend the record by altering the demise, and the plaintiff was thereupon nonsuited, the Court would not allow the propriety of the refusal to be discussed in bank (a).

It is not, however, compulsory upon joint tenants, or parceners, to allege a joint demise; for if a joint tenant, or parcener, bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land. And if all the joint tenants, or parceners, join in the action, but declare upon separate demises by each, it is held that they may recover the whole premises; because, by the several demises, the plaintiff has the entire interest in the whole subject-matter, although the joint tenancy is severed by the separate letting (b).

When two, or more, tenants in common are lessors of the plaintiff, a separate demise must be laid by each (c); or they must join in a lease to a third person, and state the demise to plaintiff to have been made by their lessee. The first is the most usual mode of proceeding, and the declaration need not state the several demises to be of the several shares belonging to the several tenants respectively: but each demise may be alleged generally to be of the whole premises demanded; for under a demise of the whole an undivided portion may be recovered (d).

The demise must be laid in the name of the party in whom the legal title is vested, and when any doubts exist upon the point, it is usual to declare upon several distinct demises by the several persons concerned in interest (e); and the claimants will

(a) Doe d. Poole v. Gerington, 1 Ad. & Ell. 750. ham v. Fenn, 3 Campb. 190.

(c) App. No. 14, 15.

(b) Doe d. Gill v. Pearson, 6 East, 173; Roe d. Raper v. Lonsdale, 12 East, 39; Doe d. Marsack v. Read, 12 East, 57; Doe d. Lul-

(d) Doe d. Bryant v. Wippel, 1 Esp. 330.

(e) App. No. 14, 15,

not then be confined at the trial to one particular demise, but will be allowed to resort to any included in the declaration, under which they may be able to prove a title to the premises. Difficulties of this nature frequently occur when trustees are lessors of the plaintiff; and it is always advisable to lay separate demises by the trustees, and *cestui que trust*, unless the effect of the Statute of Uses upon the trust is clear and indisputable. But application should, in strictness, be first made to such trustees for permission to make use of their names; and where demises are inserted in the names of any parties without their authority, the Court, on motion, will order such demises to be struck out of the declaration (*a*), unless the justice of the case requires their insertion, and a sufficient indemnity is given; and they will also interfere to set aside proceedings after verdict under similar circumstances, if the application be *bond fide*, and the affidavit on which it is grounded distinctly and unequivocally show the want of such authority (*b*). But where a bankrupt laid a demise by his assignees without their permission (they having given up to him the property in the premises) and obtained judgment and execution thereupon, the Court refused to set the proceedings aside at *the instance of the defendant in the ejectment*, notwithstanding an affidavit from one of the assignees that he knew nothing of the premises in question; considering the application a mere contrivance for defeating the action (*c*).

In a case in which the ejectment was brought on two several demises of *A.* and *B.*, the Court granted an application to strike out *B.*'s name, on affidavit that the tenant claimed under *B.*, that the action was defended to protect *B.*'s interest against *A.*, and that *A.* claimed under a conveyance from *B.* which was asserted to be invalid by reason of fraud; and this, although it was sworn in opposition, that the conveyance from *B.* to *A.* was *bond fide* for good consideration, and that *A.* was in circum-

(*a*) Doe d. Shepherd v. Roe, 2 Chitty, 170.
Chitty, 171.

(*b*) Doe d. Hammeck v. Fellis, 2 Taunt. 440.

(*c*) Doe d. Vine v. Figgins, 3

stances enabling him to defray the expenses of the proceedings, and to indemnify *B*. The principle of this decision seems to be, though no reasons are assigned by the Court, that the demise by *A*. would be sufficient, unless the conveyance to him was a fraudulent one (*a*).

If also, there is a dispute as to the inheritance, the Court will not compel the trustee of an outstanding term attending such inheritance to lend his name to either party (*b*).

When there are several demises, and proof is given in respect of all of them at the trial, if evidence be tendered by the defendant, which affects some of them only, the claimant may abandon such demises, and rest his case upon the demises which such evidence does not affect (*c*).

If a corporation be aggregate of many, they may set forth the demise without mentioning the Christian names of the corporators; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted. The reason of this is, that in the first case the name solely consists of its character, but in the last in its person; therefore there cannot be a sufficient specification of that person without mentioning his name (*d*).

In a case where the demise was laid to be by the "Mayor, &c. of the borough town of Maldon," and the name of the corporation as appeared from the charter was the "Mayor, &c. of Maldon," it was held to be no variance, it appearing from the charter, which was in evidence, that Maldon was a borough town (*e*).

(*a*) Doe d. Hurst v. Clifton, 4 Ad. & El. 809.

(*b*) Doe d. Prosser v. King, 2 Dow. P. C. 580.

(*c*) Doe d. Rowlandson v. Wainright, 2 Ad. & Ell. 520; S. P. Doe.

d. Hogg v. Tindal, 1 M. & M. 314.

(*d*) Carter v. Cromwell, Sav. 128, cited Dyer, 86.

(*e*) Doe d. Mayor, &c. of Maldon v. Miller, 1 B. & A. 699.

The stat. 59 Geo. III. c. 12, s. 17, which vests all lands, &c. belonging to the parish in the churchwardens and overseers for the time being in the nature of a body corporate, requires that the parties shall in all actions be named and described as overseers; but where in an ejectment brought under that statute, the declaration contained two counts, one describing the lessors by their office without their names, and the others by their names without their office, it was held sufficient after verdict (*a*); and in another case, where one set of counts specified the names of the individuals, and the other set omitted them, the Court, on motion, directed the last set to be struck out (*b*).

It was formerly holden, that in an ejectment by a corporation aggregate, a power of attorney was necessary, authorising some person to enter and make a lease on the lands; that such person accordingly should enter, and make a lease under seal; and that the declaration should state the demise to be by deed (*c*). These forms, it seems, were deemed necessary upon the principle, that a corporation aggregate cannot perform any corporate act otherwise than under the corporation seal, nor make an attorney, or bailiff, but by deed. But, since the principles of this action have been more clearly understood, none of these peculiarities are necessary; and the demise may now be laid in the general way, without any power of attorney being made, any lease being signed (*d*), or any statement of such a lease being introduced into the declaration. One case only is indeed to be found upon the latter point, and in that the question arose after verdict (*e*); but from the reasoning then used by the Court, no doubt can be entertained that the principle would be extended to every stage of the action; and that a plaintiff in ejectment would never be nonsuited for the omission of such a statement (*f*). The demise

(*a*) Doe d. Orleton v. Harper, 2 D. & R. 708.

(*b*) Doe d. Llandesilio v. Roe, 4 Dow. P. C. 222.

(*c*) Gilb. Eject. 35.

(*d*) Furley d. Mayor of Canter-

bury v. Wood, 1 Esp. 198.

(*e*) Partridge v. Ball, Ld. Raym. 136; S. C. Carth. 390.

(*f*) In the case of Doe d. Dean and Chapter of Rochester v. Pierce, the demise was in the common

is still certainly sometimes stated to be by deed; and it is immaterial whether it be so or not, as, notwithstanding the statement no proof of the deed is required (*a*).

So likewise in an ejectment for tithes it is now unnecessary to declare on a demise by deed, although tithes cannot pass unless by deed (*b*); and following out the principle, it is not necessary, when the demise is by the master and fellows of a college, dean and chapter of a cathedral, master or guardian of an hospital, parson, vicar, or other ecclesiastical person, to state rent to have been reserved, &c. pursuant to the statute 13 Eliz. c. 10 (*c*); nor need such statement be made when the demise is by an infant (*d*), though it formerly was held otherwise.

The day of the demise must be subsequent to the time when the claimant's right of entry accrues, and previous to the time of the service of the declaration (*e*). It is usual, however, to lay the demise as far back as the lessor's title will admit; because the judgment in ejectment is conclusive evidence as to the title of the lessor, for all the mesne profits accruing subsequently to the day of the demise (*f*); and when there are any doubts as to the period when the lessor's title accrued, it is customary to state different demises by him on different days.

In an ejectment on the demise of an heir by descent, the demise was laid on the day the ancestor died, and held to be well enough; for the ancestor might die at five o'clock, the heir enter at six, and make a lease at seven, which would be a

form, and many objections were taken upon other points by the defendant's counsel, and overruled; but they never adverted to the circumstance of the demise not being stated to be by deed. Kent, (Sum. Ass. 1809, MS.).

(*a*) *Furley d. Mayor of Canterbury v. Wood*, 1 Esp. 198.

(*b*) *Swadling v. Piers*, Cro. Jac.

613; *Partridge v. Ball*, *Ld. Raym.* 136; *S. C. Carth.* 390.

(*c*) *Carter v. Cromwell*, *Sav.* 129.

(*d*) *Zouch v. Parsons*, *Burr.* 1794, 1806, *Lill. Prac. Reg.* 673.

(*e*) *Ante*, 10; *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752.

(*f*) *Aislin v. Parkin*, *Burr.* 656.

good lease (a). It seems also, according to Lord Hardwicke, that a posthumous son, taking lands under the provisions of 10 & 11 Wm. III. c. 16, would be entitled to lay the demise, from the day of his father's death (b).

It has already been observed, that in an ejectment, by the surrenderee of copyhold premises, the demise may be laid against all persons, but the lord, on a day between the times of surrender and admittance, provided the surrenderee be admitted before trial (c).

If the date of the year of the demise be omitted in the declaration, the defendant cannot take advantage of it at *nisi prius*; and it seems the proper course for him to pursue would be to apply to the Court to compel the lessor to insert the correct date (d).

When an ejectment is founded on stat. 4 Geo. II. c. 28, s. 2, the day of the demise must be subsequently to the last day on which the rent is payable to save the forfeiture (e).

Tenancies at will scarcely exist at the present day; but when an ejectment is brought against a tenant at will, the demise must be laid subsequently to the time when possession is demanded, that is to say, subsequently to the determination of the will (f).

The length of the demise has no reference to the nature of the title of the claimant, and may be of longer duration than his interest in the land (g). A contrary doctrine was once indeed maintained, upon the principle, that by a judgment

(a) *Roe d. Wrangham v. Hersey*,
3 Wils. 274.

(b) B. N. P. 105.

(c) *Ante*, 47; *Doe d. Bennington v. Hall*, 16 East, 208.

(d) *Doe d. Parsons v. Heather*,

8 M. & W. 158.

(e) *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752; *ante*, 122.

(f) *Ante*, 75.

(g) *Doe d. Shore v. Porter*, 3 T. R. 13.

in ejectment the plaintiff recovers his *term* mentioned in the declaration, and, therefore, if the term declared on be of greater duration than the lessor's title, as, for instance, if the lessor be entitled to the lands for three years only, and the plaintiff declare on a demise for five, he would wrongfully hold the lands for the last two years (*a*). But this doctrine has since been justly overruled; because if the lessor have the right of possession but for a month, and make a lease for seven years, it will enure to his lessee for the month duly, and during that time he will be entitled to the possession; and, as the judgment in ejectment could not be used by the lessor as evidence of his title, he could not by reason of it keep possession after the month has expired (*b*).

Seven years is the term usually declared upon; and the only direction necessary to be given upon this point is, that the term be of a length sufficient to admit of the lessor's recovering possession of the land before its expiration; although the Courts are now very liberal in permitting lessors to amend in this respect, as will be stated hereafter (*c*).

It is not necessary to give any local description of the premises in the declaration beyond a statement of the county in which they lay. A demise of premises "situate in the county aforesaid," without any other local description, has been held sufficient on a motion in arrest of judgment (*d*); but it seems that the omission of *all* local description will be error, although the county and vill *in which the demise was made* are stated in the declaration, and the county is stated in the margin (*e*). But where the declaration stated, that one M. S. "*at Haswell in the county of B.*" demised to plaintiff two

(*a*) *Roe v. Williamson*, 2 Lev. 140; S. C. 3 Keb. 490.

(*b*) B. N. P. 106; *Clarke v. Rowell*, 1 Mod. 10; *vide Doe d. Strode v. Seaton*, 2 C., M. & R. 728.

(*c*) *Post*, page 179.

(*d*) *Doe d. Edwards v. Gunning*, and *Doe d. Bassett v. Mew*, 7 Ad. & Ell. 240.

(*e*) *Doe d. Rogers v. Bath*, 2 Nev. & M. 440.

messuages, from which messuages defendant *at Haswell* *afore-said* ousted plaintiff; the Court considered, that the statement of the ouster being *at Haswell*, amounted to a sufficient certainty that the lands demised lay *at Haswell* (a).

When however the premises are described as lying in a parish, hamlet, &c., the description must be a correct one; and an uncertain or improper description will be fatal. Thus, "in the parishes of *A.* and *B.* or one of them," has been held too uncertain (b), though if the words "or one of them" had been omitted, the description would have been sufficient, though all the lands were contained in one of the parishes (c).

Where the premises were described as situate "*in the united parishes of A. and B.*," which parishes had been united together by act of Parliament, for the maintaining of their poor, but for no other purpose, the variance was held fatal; for the parishes remained entirely distinct, except as to the maintenance of the poor (d).

Where the premises were described as situate in the parish of *A.* and *B.*, and it appeared that *A.* and *B.* were separate parishes, the Court of Common Pleas rejected the word parish

(a) *Goodright d. Smallwood v. Strother*, Black. 706.

(b) *Goodright v. Fawson*, 7 Mod. 457; S. C. Barn. 184; *Cottingham v. King*, Burr. 624, and the authorities there cited.

(c) *Goodwin v. Blackman*, 3 Lev. 334. In this case the ejectment was "for a tenth part of a messuage in *D.* and *F.*" and the whole messuage appearing in evidence to lay in *D.*, and no part in *F.*, the description was held ill, because it was "precisely of the tenth part of an entire thing;" though it was said by the Court, that if the ejectment had been of an acre of land in *D.* and *F.*, and it appeared that

the whole acre was in *D.*, it would be well enough. The reason for this diversity seems to be, that *the acre* being the whole thing demanded, the description is sufficiently certain, although it all be in one parish; whereas, when only *a tenth part* is demanded, it is uncertain which tenth part is meant, and, therefore, as no tenth part answers the description, the sheriff could not give execution: *tamen quære et vide* Burr. 330, and Doe *d. Marriott v. Edwards*, 1 M. & R. 319.

(d) *Goodtitle v. Pinsent d. Lamiman*, 2 Campb. 274; S. C. 6 Esp. 128.

as surplusage, and considered the demise as of lands in *A.* and *B.* (*a*); but in a case tried before Mr. Baron Parke, in which the description was precisely similar, the variance was held fatal. "Had the allegation," says the learned Baron, "been that the houses were in the *parishes* of *A.* and *B.*, I should have thought the argument good in favour of the divisibility of such allegation, but here the plaintiff has mentioned only one parish, and that by a name which does not belong to any parish" (*b*).

Where the premises were laid to be in the parish of Farnham, and were proved at the trial to be in the parish of Farnham Royal, it was held not to be a fatal variance, unless it could be proved that there were two Farnhams (*c*). Where also the premises were described as being in the parish of *W.*, and it was proved that there were two parishes of *W.*, viz. *W.* on Trym, and *W.* on Severn, the description was holden to be sufficiently certain, because "in common language the addition is not used" (*d*).

When the premises lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish; but it seems sufficient to enumerate them once only, describing them as lying in the parishes of *A.* and *B.*, or in *A.* and *B.* respectively (*e*).

The number of messuages, acres, &c. mentioned in the demise, need not correspond with the number to which the lessor claims title. He may declare for an indefinite number, as a hundred messuages, a thousand acres of arable land, &c.; and care should be taken that the number specified in the

(*a*) Goodtitle d. Brembridge v. East, 9.

Walter, 4 Taunt. 671.

(*d*) Doe d. James v. Harris, 5 M. & S. 326.

(*b*) Doe d. Marriott v. Edwards, 1 M. & R. 319.

(*e*) 2 Chitty, Prec. 395.

(*c*) Doe d. Tollet v. Salter, 13

demise be larger than the number claimed; because, although if he declare for more than he is entitled to, he may recover less, the reverse will not hold (*a*). Upon the same principle, if the lessor of the plaintiff be entitled to a moiety, or other part, of an entire thing, as the half, or third part, of a house, he may recover such moiety, or third part, on a demand for the whole (*b*).

OF THE ENTRY.

The entry of the plaintiff on the land need not be alleged in the declaration, to be made on any particular day, although in the precedents it is usually so stated. It is sufficient if it be declared generally, that the plaintiff entered by virtue of the demise: nor does it seem to have been required, even in the ancient practice, to be more explicit, because, as the plaintiff entered by virtue of the lease, he must necessarily have entered after his title accrued; though it was then said, that it might have been otherwise, if the declaration had been *prætextu cuius* he entered, for the plaintiff might enter unlawfully, or before his time, under pretence of the lease (*c*).

OF THE OUSTER.

The day upon which the ouster of the plaintiff, by the casual ejector, is alleged to have taken place, should regularly be after the commencement of the supposed lease and entry. This is requisite, in order to support the consistency of the fiction;

(*a*) *Denn d. Purvis v. Purvis*, Burr. 326; *Guy v. Rand*, Cro. Eliz. 13.

(*b*) *Ablett v. Skinner*, 1 Siderf. 229; *Goodwin v. Blackman*, 3 Lev. 334. In an ancient case it is said, that if an ejectment be brought for an acre of land, and the metes and bounds be described in the declaration, and the jury find the de-

fendant guilty in half an acre of land, the verdict will be bad; because of the uncertainty of which part, or moiety, the plaintiff is to have execution. (*Winkworth v. Mann*, Yelv. 114, *tamen quære, et vide ante*, chap. 2).

(*c*) *Wakeley v. Warren*, 2 Roll. Rep. 466; *sed vide Douglas v. Shank*, Cro. Eliz. 766.

because, as the title of the plaintiff is supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before, by his own showing, he had any claim to be possessed. But it does not seem absolutely necessary that this consistency should be preserved; for, as the words “afterwards, to wit,” are always used immediately before mentioning the day of the ouster, it is most probable, upon the principles by which ejectments are at present regulated, that the Courts would in all cases consider an ouster laid previously to the day of the entry, “as impossible and repugnant,” and as such reject it (*a*). Even when the old practice prevailed, and the true principles of the remedy were so little understood, every possible intention was made in favour of the plaintiff, when an ouster was alleged anterior to the time of the demise. Thus, on a demise from the first of February, 1752, to hold from the eighth of January before, and that afterwards, namely, on the 28th of January, 1752, defendant ejected him, and it was insisted for the defendants, that the plaintiff’s title did not commence until the first of February, and therefore that the ouster was laid too soon; the Court held, that the day of the ouster, being laid under a *scilicet*, was surplusage, and that “afterwards” should relate to the time of making the lease, and then all would be well enough (*b*). In like manner, on a demise from the sixth of May, *anno septimo*, by virtue of which plaintiff entered, and was possessed until afterwards, on the eighteenth of the same month, *anno sexto supradicto*, defendant ejected him, the Court held the declaration sufficient; because the ouster was laid to be on the eighteenth of the same month, which it could not be if it were done in the sixth year, and rejected the word *sexto* as inconsistent and void (*c*). Upon the same principle, where the demise was on the sixth of September, 2 Jac., by virtue of which the plaintiff held, until afterwards, (to wit) on

(*a*) *Adams v. Goose*, Cro. Jac. 96.
B. N. P. 106.

(*b*) B. N. P. 106.

(*c*) *Davis v. Purdy*, Yelv. 182.

the fourth day of September, 2 Jac., defendant ejected him, the declaration was holden good, and the words under the *scilicet* rejected as surplusage (a).

From the case of *Merrell v. Smith* (b), it does not seem necessary to allege any particular day for the ouster, provided it appears from the declaration, to be subsequently to the commencement of the term, and prior to the bringing of the action; but in the precedents a day certain is always laid, and it is the better method to mention a particular day.

With respect to the ouster in an ejectment for tithes, it is said in the case of *Worrall v. Harper* (c), that where the ouster was set forth to have been made in the month of May, it was held ill, because there were no tithes to be ousted of at that season of the year; but this doctrine is controverted by Gilbert, C. B., on the principle that the law does not judicially take notice of the time when tithes arise (d).

OF AMENDING THE DECLARATION.

It was formerly the practice not to permit the declaration in ejectment to be amended, until the landlord, or tenant, had been made defendant, and, consequently, if the defects were such as to prevent the Courts from granting the common rule

(a) *Adams v. Goose*, Cro. 96. Some old ejectment cases are to be found in the books, (*Goodgain v. Wakefield*, 1 Sid. 7; *Evans v. Croker*, 3 Mod. 198; *Stephens v. Croker*, Comb. 83; *Higham v. Cooke*, 4 Leon. 144; *Osborn v. Rider*, Cro. Jac. 135; *Llewelyn v. Williams*, Cro. Jac. 258; Clayton's case, 5 Co. 1), in which the ousters were laid on the same days as the demises, and which were decided upon the distinctions formerly taken, as to the time of the commencement of a demise, when

stated in the lease to be "from the date," and when from "the day of the date" of the lease; but, since the judgment in *Pugh v. Duke of Leeds* (Cowp. 714), by which it has been determined, that these expressions shall be construed indifferently, either *inclusively* or *exclusively*, so as to give effect to the deed, these cases can no longer be authorities.

(b) Cro. Jac. 311; Jenk. 341.

(c) 1 Roll. Rep. 65.

(d) Gilb. Eject. 67.

for judgment against the casual ejector, the plaintiff's lessor was compelled to discontinue the action, and resort to a new ejectment (a). But this practice is inconsistent with the present mode of regulating the remedy; and the Court would, it is presumed, now permit the lessor to amend his declaration before appearance, provided such amendment did no injustice to the tenant. Indeed, where by mistake, the name of the tenant in possession was inserted at the commencement of the declaration, instead of that of the casual ejector, (the declaration and notice to appear being in other respects regular,) the Court granted the rule for judgment upon the common affidavit of service, and suggested that if the tenant did not appear to the action, an application should be made to amend the declaration (b); but where the mistake was in the Christian name of the lessor, the Court would not allow the amendment to be made where there was no appearance (c).

It is also said that, even after appearance, the declaration can be amended in *form* only, and not in *matter of substance*, but it is now difficult to point out what errors would be deemed substance, and not amendable. Under the strict rules, by which the action was formerly conducted, the demise, the length of the term, the time of the ouster, &c. (d), were all considered as matters of substance (e); and so unbending were the Courts upon these points, that if the term expired pending the action,

(a) *Roe d. Stephenson v. Doe*, Barn. 186.

(b) *Doe d. Cobbey v. Roe*, K. B. T. T. 1816, MS.; *Doe d. Dickenson v. Roe*, 9 Dow. P. C. 363.

(c) *Doe d. Street v. Roe*, 8 Dow. P. C. 444.

(d) Formerly when a person declared in ejectment in the Common Pleas, it was the course of the Court, that after imparlance he should make a second declaration; and when this practice prevailed, if the plaintiff, by his first declara-

tion, had laid the ouster before the commencement of his term, or omitted any other matter of substance, though the second declaration were correct, he could not recover; because the declaration on the imparlance roll was the material one on which the action was grounded.—(*Merrell v. Smith*, Cro. Jac. 311.—*Jenk.* 341).

(e) *Doe d. Hardman v. Pilkington*, Burr. 2447, and the cases there cited.

by injunction from the Court of Chancery at the defendant's application, or by the delay of the Court, in which the action was brought, in giving judgment, the lessor was obliged to resort to a new ejectment (*a*).

A more liberal principle now prevails, and the demise, term, &c., are considered as formal only, and may be amended until the cause is called on for trial, and the jury sworn: the Judges acting uniformly on this sensible rule, that if the defendant has relied solely upon the formal defence, and will surrender up possession upon the amendment being made, he shall be paid the whole of his costs, but if he refuses to relinquish the possession and will hazard a trial notwithstanding the amendment, he is entitled to the costs of the amendment only (*b*).

Thus with respect to the demise, in an ejectment to recover lands forfeited by the levying of a fine, where the demise was laid anterior to the entry, and the suit was staid by injunction, for more than five years after the fine was levied, so that the lessor was not in time to make a second entry, or bring a second ejectment, the Court permitted the day of the demise, to be altered to a day subsequent to the day of the entry (*c*). So likewise in an ejectment upon a forfeiture, where the demise was laid anterior to the time of the forfeiture, the Court permitted the lessor to amend (upon payment of costs) after the record was made up, and the cause set down for trial (*d*). So,

(*a*) Anon. Salk. 257; S. C. 6 Mod. 130; *Scrape v. Rhodes*, Barn. 8; *Driver v. Scratton*, Barn. 17; *Kesworth v. Thomas*, And. 208; *Thrustout v. Gray*, Cas. Temp. Hard. 165.

(*b*) *Doe d. Lewis v. Coles*, 1 R. & M. 380; *vide* 1 Chitty, 535, note (*a*), and *Doe d. Manning v. Hay*, 1 M. & Rob. 243.

(*c*) *Roe d. Hardman v. Pilking-*

ton, Burr. 2447.

(*d*) *Doe d. Rumford v. Miller*, K. B. H. T. 1814, MS. This case seems to carry the principle of allowing an amendment of the demise in an ejectment to its utmost limit. The ejectment was brought upon a covenant to finish certain buildings in a workmanlike manner before the 29th of Sept. 1813. The demise was laid on the 26th day of

also, a new count has been permitted upon a new demise after three Terms had elapsed and the roll had been made up and carried in (a). But this permission is not to be extended to the injury of the defendant, and therefore the Court will not suffer the demise to be altered to a day subsequent to the day of the delivery of the declaration, for this would be to give the lessor of the plaintiff a right of action which did not subsist at the time of the commencement of his suit (b).

In like manner amendments have been permitted in the description of the premises, as by altering the parish from the parish of *G.* to "the parish of St. John in *G.*" (c), and by striking out after judgment and writ of error brought, where the ejectment was brought for "twenty messuages, twenty tenements, &c.," the words "twenty tenements" (d). At a similar stage of the cause also an amendment has been allowed by the insertion of a local description of the premises, when *all* local description had been previously omitted (e).

In like manner the term has been enlarged after its expiration upon payment of costs, although the issue was made up, the special jury struck, and the cause gone down to trial, before the mistake was discovered; the Court considering, that it was a plain mistake in the declaration, and might be amended by the writ, which spoke of a term not yet expired (f).

March, 1813, and the declaration delivered *on the 29th of Oct.* 1813. The cause was set down for trial, at the first sittings in Middlesex, in Hilary Term, 1814; but stood over until the second sittings. And two days before the second sittings, a rule to shew cause why the day of the demise should not be altered to the 30th of Sept. was obtained; and made absolute immediately before the rising of the Court on the morning of the second sittings.

(a) *Doe d. Beaumont v. Armistage*, 1 D. & R. 173; 2 Chit. 302.

(b) *Doe d. Foxlow v. Jeffries*, K. B., M. T. 1814, MS.

(c) *Doe d. O'Connell v. Porch*.—*Coram* Heath, J. Trin. Vac. 1814, MS.

(d) *Doe d. Lawrie v. Dyeball*, 1 M. & R. 330; 8 B. & C. 70, *ante*, p. 22.

(e) *Doe d. Rogers v. Bath*, 2 N. & M. 440.

(f) *Roe d. Lee v. Ellis*, Blk. 940.

An enlargement of the term was also permitted, by Lord Mansfield, in a case where a judgment in ejectment in Ireland had been affirmed, upon a writ of error, in the King's Bench in England, but, from various delays, the term in the declaration had expired before the plaintiff's lessor could obtain possession (*a*); but in a late case, where a vast number of years had been allowed to elapse (nearly fifty) from the date of the original judgment, the Court would not allow the term to be enlarged upon affidavits, stating that the cause had been staid in Chancery by injunction, and that from want of funds the original parties to the suit had been unable to proceed, and suggested that the proper course would be to apply to the Lord Chancellor, who might, if the case required it, order the parties to consent to the amendment (*b*). And in another case, where after a period of twenty years had elapsed from the date of the judgment, the lessor applied for permission to enlarge the term in order that he might sue out a *scire facias* to revive the judgment and obtain possession, the Court not only refused the rule, but Abbott, C. J. stated that he very much doubted whether in such a case the Court ought to allow the *scire facias* to issue, even if the term had not expired (*c*).

When the old principles of the action prevailed, and the term was considered substance, and not amendable, the plaintiff was not nonsuited if the term expired before the trial, but was permitted to proceed for his damages and costs, though not for the recovery of his land; for the right to damages for the ouster remained, although the right to possession upon the lease was determined. It is not probable at the present day, that opportunity will be offered to raise a point of this nature, but if the lessor of the plaintiff should act so negligently as to proceed to trial upon an expired term, there seems no reason

(*a*) *Vicars v. Heydon*, Cowp. 841.

(*c*) *Doe d. Reynell v. Tuckett*, 2

(*b*) *Bradney v. Hasselden d.* B. & A. 773.

Harper, 1 B. & C. 121.

why the above-mentioned principle should not be applicable to the modern practice (a).

OF THE NOTICE TO APPEAR (b).

The name of the tenant in possession must be prefixed to the notice; and, when the possession of the disputed premises is divided amongst several, it is usual to prefix the names of all the tenants, to each separate declaration; although it is not necessary to prefix more than the name of the individual tenant, upon whom the particular declaration is served (c). The notice should contain the Christian and surnames of the tenant or tenants in possession, and a notice addressed "*To Mrs. Hicks*" has been held insufficient (d); but a different rule seems now to prevail, and it is to be collected from the sum of the recent cases, although some of them contain special facts as to the mode of service, that the insertion of a wrong Christian name, or the omission of the Christian name altogether, will not invalidate the notice (e), and the reason for this rule seems to be, that the defendant would otherwise have the advantage of a plea in abatement which never is allowed in this action (f). But a notice directed "*to the personal representatives of A. B., (the deceased tenant)*" (g), or addressed to *A. B.*, and served upon *C. D.* will be insufficient (h).

(a) *Capel v. Saltonstall*, 3 Mod. 249.

(b) Appendix, No. 13.

(c) *Roe d. Burlton v. Roe*, 7 T. R. 477; *Doe d. Field v. Roe*, 1 Har. & W. 516.

(d) *Doe v. Roe*, 1 Chitty, 573.

(e) *Doe d. Warne v. Roe*, 2 Dow. B. C. 517; *Doe d. Folkes v. Roe*, 2 Dow. P. C. 567; *Doe d. Frost v. Roe*, 3 Dow. P. C. 563; *Doe d. Peach v. Roe*, 6 Dow. P. C. 62; *Doe d. Smith v. Roe*, 6 Dow. P. C.

629; *Doe d. Smart v. Roe*, 9 Dow. P. C. 340; *Doe d. Messer v. Roe*, 5 Dow. P. C. 716; *Anon.* 1 Chitty, 573, note (a).

(f) *Doe d. Stainton v. Roe*, 6 M. & S. 203.

(g) *Doe d. Governors of St. Margaret's Hospital v. Roe*, 1 B. Moore, 113; *Doe d. Paul v. Hurst*, 1 Chitty, 162.

(h) *Doe d. Smith v. Roe*, 5 Dow. P. C. 254.

The notice will be sufficient, although the address of the tenant be omitted, provided the tenant was duly served with a copy of the declaration before the first day of Term, and acknowledged such service (a).

The notice must require the tenant to appear, and apply to the Court to be admitted defendant instead of the casual ejector, within a certain time after the declaration is delivered; and when the provisions of the statute 1 Geo. IV. c. 87, s. 1, are resorted to, the notice must also inform the tenant that he will be required to enter into a recognizance with two sufficient sureties, in such reasonable sum as the Court shall direct, to pay the costs and damages which may be recovered in the action.

The time when the notice should require the tenant to appear and apply to be made defendant, is regulated by the locality of the premises; unless the proceedings are regulated by statute 1 Wm. IV. c. 70, s. 36, when the notice must invariably require the tenant to appear *within ten days* after the delivery of the declaration.

In all other cases when the premises are situated in London, or Middlesex, the notice should be for the tenant to appear "on the first day" of the Term next after the delivery of the declaration, specifying the Term by name; but it will be sufficient if the notice be to appear *generally* of the Term, though in such case the tenant will have the whole Term to appear in.

When the premises are situated elsewhere than London or Middlesex, the notice should require the tenant to appear generally in the Term next ensuing the delivery of the declaration, naming also the Term as before directed, though it will be sufficient when the proceedings are in the Common Pleas, if

(a) Doe d. Pearson v. Roe, 5 B. Moore, 73.

it require him to appear in the *issuable* Term, next ensuing such delivery, although a non-issuable Term intervene (*a*).

It is not advisable to deviate from these general forms; but there are cases in which the Courts have allowed other forms to prevail. Thus a notice to appear "in the beginning of the Term (*b*)," to appear "in next Hilary," omitting the word Term (*c*), to appear "within ten days," being served immediately before Term (*d*), have been held sufficient; and where the notice was to appear "next Easter Term" and was dated May 13, and the affidavit of service stated that it had been explained to the tenant that he was to appear in the next Trinity Term, the Court granted a rule nisi (*e*); but notice to appear "on the morrow of the Holy Trinity (*f*)," or "in eight days of St. Hilary (*g*)" and to appear "in due time," have been held insufficient (*h*).

Where a declaration delivered in Easter Vacation was entitled of *Easter* Term, and the notice was to appear on the first day of *next* Term, the Court granted the common rule for judgment against the casual ejector during *Easter* Term (*i*). Where also the notice had been given by mistake for *Hilary* instead of *Trinity* Term, and the tenant was afterwards informed of the mistake, a rule *nisi* was granted (*k*); and in a subsequent case, upon a similar error, Holroyd, J. granted the common rule (*l*). Where also the declaration was by original, and the notice was as if by bill, omitting "wheresoever, &c.," the variation was held immaterial (*m*). But where the notice was to appear *in*

(*a*) Doe d. Clarke v. Roe, 4 Taunt. 738.

(*b*) Tredder v. Davis, Barnes, 175.

(*c*) Doe d. Diamond v. Roe, 8 Dow. 308.

(*d*) Anon. 1 Dow. P. C. 18.

(*e*) Doe d. Symes v. Roe, 5 Dow. P. C. 667.

(*f*) Sel. N. P. 640.

(*g*) Lackland d. Dowling v. Badland, 8 Moore, 79.

(*h*) Doe d. Isherwood v. Roe, 2 Nev. & M. 476.

(*i*) Anon. K. B., E. T. 1817, MS.

(*k*) Anon. 2 Chitty, 171.

(*l*) Doe d. Greaves, 2 Chitty, 172.

(*m*) Doe d. Thomas v. Roe, 2 Chitty, 171.

eight days of St. Hilary, instead of *Hilary Term* generally, the Court refused the rule (a); as they also did where the declaration was entitled *in the King's Bench*, and the notice was to appear in the *Common Pleas* (b); though a rule nisi has since been granted in a precisely similar case (c).

The notice should regularly be subscribed with the name of the casual ejector, and formerly proceedings have been set aside for an irregular signature; but it is now sufficient if the notice be subscribed with the name of the nominal plaintiff, or of the lessor, or of any other person (d).

In a case where two notices were annexed, one in the usual form, and the other requiring the tenant to appear, and enter into recognizance pursuant to Geo. IV. c. 67, the Court granted the common rule, allowing the plaintiff to treat the second notice as surplusage (e).

There are only two reported cases in which amendments have been made, by rule of Court, in the notices subscribed to the declaration; but it cannot be doubted that any amendments would now be allowed, which the justice of the case might require. Thus an amendment was permitted in a country cause, where the notice was to appear in *Michaelmas Term*, when, according to the practice in country causes at that time, it should have been to appear in an issuable Term, and the affidavit stated, that if the lessor were not permitted to amend, he would be barred by the Statute of Limitations, from bringing a new ejectment. A rule nisi was in the first instance granted,

(a) *Lackland d. Dowling v. Badland*, 8 B. Moore, 79.

(b) *Doe d. Lewis v. Roe*, K. B. M. T. 1821, MS.

(c) *Doe d. Evans v. Roe*, 9 Dow. P. C. 998.

(d) *Peaceable v. Troublesome*,

Barn. 172; *Hazlewood d. Price v. Thatcher*, 3 T. R. 351; *Goodtitle d. Duke of Norfolk v. Notitle*, 5 B. & A. 849.

(e) *Doe d. Roberts v. Roe*, 5 Dow. P. C. 508.

which on showing cause was made absolute (*a*). And a like course was pursued where the words "or you will be turned out of possession of the same," had been omitted in the notice (*b*).

(*a*) Doe d. Bass v. Roe, 7 T. R.
469.

(*b*) Doe d. Darwent v. Roe, 3
Dow. P. C. 336.

CHAPTER VII.

Of the Service of the Declaration and Proceedings to Judgment against the Casual Ejector when no Appearance.

THE declaration in ejectment being considered by the Courts as a kind of writ or process, the rules by which its delivery to the tenant in possession are regulated resemble the service of a writ rather than the delivery of a declaration. It is in truth a substitute for a writ, and is the only warning which the tenant receives of the proceedings of the claimant. The Courts therefore before they authorise a judgment to be entered against the casual ejector, require full proof that the declaration has been duly received by the tenant, and that its nature and contents were explained at the time of the service.

Our next inquiry will be directed to the different incidents attendant upon this service, and the different modes by which it may be effected.

The service of the declaration (except when the proceedings are under the stat. 1 Wm. IV. c. 70 (*a*), when the service must be within ten days next after the title has accrued) must be effected *before* the first day of the Term in which the notice at its foot directs the tenant to appear (*b*); and whensoever Easter may fall, April 15 is always for this purpose reckoned the first day of *Easter Term* (*c*). It must either be served personally upon the tenant in possession of the premises *at the time of the service*, or satisfactory proof given by affidavit on the motion for

(*a*) *Vide post*, chap. 12.

(*b*) Reg. Gen. Trin. Term, 1831.

(*c*) Doe d. Frodsham v. Roe, 6

Dow. P. C. 479.

judgment against the casual ejector, either that it duly reached his hands within the proper time, or that the service could not be duly effected.

The power exercised by the Courts in granting rules for judgment against the casual ejector is entirely discretionary; and they correctly watch with the utmost jealousy every deviation from the rule requiring personal service. This due attention on their part to the interests of the party in possession, has given rise to many minute and to some almost imperceptible distinctions in the reported judgments; but the governing principle of all the decisions is, that unless the Court be thoroughly satisfied that the tenant in possession *at the time of the service*, has been duly served with the declaration at the proper time, or that the utmost diligence has been used to effect such service, the rule for judgment against the casual ejector will not be granted.

The modern cases upon these points are singularly numerous, and they may be arranged under the following heads, namely; when there are two or more tenants in possession, or the possession is held by the tenant in some peculiar capacity; when the tenant is bankrupt, or lunatic; when the service is on an agent, attorney, or bailiff; when the tenant is dead, or has absconded; when the service is upon the wife of the tenant, or a member of, or servant in his family; when the service is prevented by fraud or violence; and when the premises are entirely deserted.

When personal service has been effected, it is immaterial whether it be upon the demised premises or elsewhere (*a*), or whether the party is or is not living within the jurisdiction of the Court (*b*); but it must be remembered, that the service must

(*a*) *Savage v. Dent*, Stran. 1064;
Taylor v. Jefts, 11 Mod. 302.

(*b*) *Doe d. Daniel v. Woodroffe*,
7 Dow. P. C. 494.

be upon the party in possession *at the time of the service*, so that when the ejectment is brought by a landlord against his tenant, and the tenant has underlet the premises, the service must be upon the under-tenant, or under-tenants if more than one, and a service upon the original tenant will not be sufficient (*a*). But if the service is upon the original tenant, and he appears and pleads, he cannot afterwards release himself from the action upon the ground, that his under-tenants, and not himself, are in possession (*b*).

When several persons are jointly in possession, the service ought in strictness to be upon each party separately (*c*); but the general rule seems to be, (although some exceptions are to be found), that service upon one of two joint tenants is sufficient (*d*): but that when the parties in possession are not joint tenants, then the common rule will be granted against the parties actually served, and a rule *nisi* against the other parties (*e*).

Service on one of several partners has been held sufficient against all (*f*), and so has service on one of two tenants who said the other was only his servant (*g*). But service upon *A. B.*, where the notice is addressed to *C., D.*, although both be tenants will be insufficient (*h*); and in one case of service upon one of two joint tenants, who were also partners in trade, a rule *nisi* only was granted (*i*).

(*a*) Doe d. Lord Darlington v. Cock, 4 B. & C. 259. Doe d. Elwood v. Roe, 3 B. Moore, 578; Doe d. Bailey v. Roe, 1 B. & P. 369; Doe d. Grimes v. Roe, 4 Dow. P. C. 86, 591.

(*b*) Roe v. Wiggs, 2 N. R. 330.

(*c*) B. N. P. 98.

(*d*) Doe d. Williams v. Roe, 10 Moore, 493; Doe d. Clothier v. Roe, 6 Dow. P. C. 291; Doe d. Hutchinson v. Roe, 2 Dow. P. C. 418. (*f*) Doe d. Overton v. Roe, 9 Dow. P. C. 1039; Doe d. Tomkins v. Roe, W. W. & D. 49; Doe d. Hall v. Roe, W. W. & D. 392.

(*e*) Right v. Wrong, 2 Chitty, 175; Doe d. Field v. Roe, 2 Chitty, 174; Anon. 2 Chitty, 176; Doe d. Bromley v. Roe, 1 Chitty, 141; (*g*) Doe d. Sheppard v. Roe, W. W. & D. 75.

(*h*) Doe d. Smith v. Roe, 5 Dow. P. C. 255; 2 R. & W. 332.

(*i*) Doe d. Field v. Roe, 2 Chit. 17.

Service of the declaration on the secretary of the East India Company, in respect of premises sought to be recovered from the company, but who did not reside on the premises is sufficient (*a*); as also service on the secretary of a company incorporated by act of Parliament, enacting generally that service upon such secretary should be good as against the company (*b*). So also, service *at the London station* upon an officer of the Southampton Railway Company, who was sworn to be in possession of the premises (*c*). So also service upon the book-keeper of a company, who occupied part of the premises sought to be recovered (*d*); and where service was upon the clerk of an incorporated company, not empowered to sue and be sued in the name of their clerk, on a portion of the premises sought to be recovered, although such clerk was not resident thereon, it was held sufficient for a rule *nisi* (*e*). So also service upon the clerk of a Canal Company, at the office of the company, where the action was to recover part of the bed of a canal (*f*). But where the action was to recover land illegally taken into a road under a private act of Parliament, and the service was upon *one* of the commissioners in whom the road was vested and their clerk, the rule was refused altogether (*g*).

When property in possession of parish officers is rented by them, for the purpose of accommodating the parish poor, service upon the churchwardens and overseers, will be sufficient, although they do not occupy the house, otherwise than by placing the poor in it (*h*). But service upon one of them only will not avail (*i*).

(*a*) Doe d. Coopers' Company, v. Roe, 8 Dow. P. C. 134.

(*b*) Doe d. Bromley v. Roe, 8 Dow. P. C. 858.

(*c*) Doe d. Martyns v. Roe, 6 Scott, 610.

(*d*) Doe v. Roe, 1 Dow. P. C. 23.

(*e*) Doe d. Ross v. Roe, 5 Dow. P. C. 147.

(*f*) Doe d. Fisher v. Roe, 10 M. & W. 21.

(*g*) Doe d. White v. Roe, 8 Dow. P. C. 71.

(*h*) Tupper d. Mercer v. Doe, Barnes, 181.

(*i*) Doe d. Weeks v. Roe, 5 Dow. P. C. 405.

In ejectments to recover possession of dissenting meeting houses, service on the minister and one of the trustees (*a*), on the trustees and at the meeting house (*b*), on the trustees and the sexton who holds the keys (*c*), on a surviving lessee and a sextoness (*d*), and on an officiating minister and a party paying the chapel rates (*e*), have been held sufficient. In some of these cases, rules absolute were granted in the first instance, in other rules *nisi*, but the reasons for these differences are not perceptible.

In ejectments for free schools service upon the master and sticking the declaration on the door, and service on a person resident in the school-house have been held good services (*f*).

When the tenant has become bankrupt, service on the official assignee only, and on a person "representing himself" as messenger in possession, has been held sufficient service to warrant the ordinary rule (*g*); whereas service upon all the assignees, upon the tenant himself, and upon the messenger, has been held only sufficient for a rule *nisi* (*h*).

If the tenant in possession be a lunatic, the service should notwithstanding be upon him, although he be confined in a lunatic asylum (*i*): unless he has been found lunatic, in which case it seems the service should be on his committee (*k*). Service upon the daughter (*d*), or servant (*e*), is insufficient; but

(*a*) Doe d. Smythe v. Roe, 8 P. C. 509; Doe d. Earl Somers v. Roe, 8 Dow. P. C. 292.

(*b*) Doe d. Gray v. Roe, 7 Dow. P. C. 700. (*g*) Doe d. Baring v. Roe, 6 Dow. P. C. 456; Doe d. Johnson v. Roe, 1 Dow. P. C. 493.

(*c*) Doe d. Scott v. Roe, 6 Scott, 732; Doe d. Dickens v. Roe, 7 Dow. P. C. 121. (*h*) Doe d. Chadwick v. Roe, 9 Dow. P. C. 492.

(*d*) Doe d. Kushner v. Roe, 7 Dow. P. C. 97. (*i*) Doe d. Gibbard v. Roe, 9 Dow. P. C. 844; Doe d. Brown v. Roe, 6 Dow. P. C. 270.

(*e*) Doe d. Earl Somers v. Roe, 8 Dow. P. C. 292. (*k*) Anon. Loft. 401.

(*f*) Doe d. Smyth v. Roe, 8 Dow.

in a case, where *C.*, who lived with the lunatic and transacted his business, would not permit the deponent to have access to her, whereupon he delivered the declaration to *C.*, the Court granted a rule nisi against the lunatic and *C.*, and held the service on *C.*, to be good service (*a*).

Where the tenant was personated, at the time of the service, by another, who accepted the service in the tenant's name, the Court granted a rule nisi, and directed that leaving a copy of the rule at the house, with some person there, or, if no one was to be met with, affixing it to the door, should be good service (*b*). But service on a person who asserts that he is owner, and that there is no tenant in possession is not alone sufficient, even for a rule to shew cause (*c*).

Service upon an agent is insufficient, unless the tenant is resident abroad, or has absconded to another country, or keeps out of the way to prevent service (*d*).

Service upon a person appointed by the Court of Chancery to manage an estate for an infant, although the estate consisted of a large wood, of which no tenant was in possession, has been held insufficient (*e*); but it would seem that service upon a bailiff, who delivers the declaration over to the tenant's attorney, or upon the tenant's attorney himself, accompanied by an undertaking on the part of the attorney, to appear to the action, will be sufficient foundation for a rule nisi (*f*).

(*a*) Doe d. Lord Aylesbury v. Roe, 2 Chitty, 163.

(*b*) Fenn d. Tyrrell v. Denn, Burr. 1181.

(*c*) Doe d. Davis v. Roe, 1 Price, P. C. 11.

(*d*) Doe v. Roe, 4 B. & A. 653; Doe d. Treat v. Roe, 4 Dow. P. C. 278; Doe d. Tomkins v. Roe, W.

W. & D. 49; Doe d. Robinson v. Roe, 3 Dow. P. C. 11; Doe d. Morpeth v. Roe, 3 Dow. P. C. 570.

(*e*) Goodtitle d. Roberts v. Badtitle, 1 B. & P. 385.

(*f*) Jenny d. Mills v. Cutts, 1 Scott, 52; Anon. 1 Chitty, 181; Doe d. Collins v. Roe, 1 Dow. P. C. 613; Anon. 2 Chitty, 187,

When the tenant is dead, in order to make service upon his representatives sufficient, they should be addressed by name in the notice; and the affidavit should state them to be tenants in possession. If this cannot be done the lessor should proceed under the stat. 11 Geo. II. c. 19, as in case of a vacant possession; and if a servant of the deceased tenant remains on the premises and resists the claimant in his endeavours to obtain possession, he may be treated as tenant, and the declaration served upon him as such (*a*). And where the premises were held by lease, and the lessee was dead, and the ejectment was brought for a forfeiture, service on the administratrix, to whom it was sworn that it was believed that the interest in the lease passed, and on the person in possession of the premises, was held good service (*b*).

When the tenant has absconded, services upon the wife, upon a broker having the key of the house with instructions to let it, upon the tenant's attorney and "a person believed to have been left in possession by the tenant," together with service at the tenant's last place of abode, leaving the declaration at the tenant's country house, when he had rendered the demised premises inaccessible, affixing the declaration on a conspicuous part of the premises, and upon the door of a barn in which the tenant had occasionally slept, where there was no dwelling-house, and the like have been held good services (*c*); but in all these cases it has been required that it should appear distinctly in the affidavits of service, that the tenant had absconded or kept out of the way to avoid service,

(*a*) *Doe d. Paul v. Hurst*, 1 Chit. 162; *Doe d. St. Margaret Westminster v. Roe*, 1 Moore, 113; *et vide Hazelwood d. Price v. Thatcher*, 3 T. R. 351.

(*b*) *Doe d. Pamphilon v. Roe*, 1 Dow. P. C. 186.

(*c*) *Doe v. Roe*, 1 D. & R. 514;

Doe d. Scott v. Roe, 6 Bing. N. C. 207; *Anon.* 2 Chitty, 179; *Doe d. Hill v. Roe*, 2 Chitty, 178; *Fenn d. Buckle v. Roe*, 1 N. R. 293; *Barrow v. Roe*, 1 Man. & G. 238; *Sprightley d. Collins v. Durch*, Burr. 1116.

that his residence was unknown, and that reasonable diligence, shewing the nature thereof, had been used to effect the service in the ordinary manner (*a*).

It has however in one case been held that an affidavit that the tenant was abroad, and that it was uncertain when he would return, accompanied by service on the premises on the tenant's servant was of itself sufficient for a rule *nisi* (*b*).

Where premises were charged with an annuity, with a right of re-entry for arrears, and the tenant in possession was resident abroad for the purpose of avoiding his creditors, the Court of Common Pleas considered that service of the declaration on the premises and affixing a copy upon the outer door of the house was insufficient; and refused also to permit service on the solicitor of the tenant to be deemed good service, unless the residence abroad was for the express purpose of avoiding service in the particular action (*c*); and in a case in the King's Bench, in which it was sworn that the party went abroad to avoid the service of the declaration, the affixing of a copy of the declaration was required, as well as service upon a servant of the tenant on the premises (*d*).

With respect to service upon the wife of the tenant in possession the decisions are certainly in some respects contradictory; but the rule to be collected from the majority of them is, that the service will be held sufficient if the Court is satisfied that the parties are man and wife, or have represented themselves and are believed so to be, and that they are residing

(*a*) Anon. 1 Chit. 505; 2 Chit. 177; Doe d. Batson *v.* Roe, 2 Chit. 176; Doe d. Lowe *v.* Roe, 1 Chit. 505; Doe d. Tarply *v.* Roe, 1 Chit. 506.

(*b*) Doe d. Mather *v.* Roe, 5 Dow. P. C. 552.

(*c*) Roe d. Fenwick *v.* Doe, 3 Moore, 576; Doe d. Bracebridge *v.* Roe, 7 Scott, 689.

(*d*) Doe d. Jones *v.* Roe, 1 Chit. 213; Doe d. Lowe *v.* Roe, 2 Chit. 177; Doe d. Hele *v.* Roe, 2 Chit. 178.

together at the time of the service (*a*). Where the service on the wife is effected upon the demised premises (*b*), or it would seem at the residence or place of business of the husband, if it be near to them (*c*), the Court will assume that they are living together, otherwise that fact must be stated in the affidavit of service; and this rule applies although the service be effected at the dwelling-house of the parties, if it be not on or near the demised premises (*d*).

The mere acknowledgment of the wife, that she has received a declaration, and given it to her husband, if it be not personally served upon the wife will not be good service (*e*); nor will the Court allow a declaration of the wife respecting her husband's absence, &c. to be made use of against him for the purposes of the rule (*f*); nor will a declaration where the service has not been personally on her, that she will see her husband and tell him what to do, or any thing of a like nature avail (*g*). But where the wife ran in and closed the door so that the deponent could not leave the notice with her; but he read and explained the same aloud, and affixed a copy on the door, the Court granted a rule *nisi*, upon the ground, it should seem, that this was in the nature of a personal obstruction to the due service of the notice (*h*).

(*a*) Doe d. Walker *v.* Roe, 4 M. & P. 11; Doe d. Brenner *v.* Roe, 8 Dow. P. C. 135; Doe d. Simmons *v.* Roe, 1 Chitty, 228; Doe d. Grange *v.* Roe, 1 Dow. N. S. 274.

(*b*) Goodtitle *v.* Badtitle, 4 Taunt. 820.

(*c*) Doe *v.* Roe, 1 Dow. P. C. 67; Doe d. Bath, Marquis of, *v.* Roe, 7 Dow. P. C. 692.

(*d*) Goodright d. Waddington *v.* Thrustout, 2 W. Black. 800; Doe d. Wingfield *v.* Roe, 1 Dow. P. C. 693; Right d. Bomsall *v.* Wrong, 2 D. & R. 84; Doe d. Graff *v.* Roe,

4 Dow. P. C. 456; Doe d. Williams *v.* Roe, 2 Dow. P. C. 89; Doe d. Mingay *v.* Roe, 6 Dow. P. C. 182; Doe d. Boulcott *v.* Roe, 7 Dow. P. C. 463.

(*e*) Goodtitle d. Read *v.* Badtitle, 1 B. & P. 384; Doe d. Tucker *v.* Roe, 2 Dow. P. C. 775.

(*f*) Doe d. Wilson *v.* Smith, 3 Dow. P. C. 379.

(*g*) Doe d. Briggs *v.* Roe, 1 Dow. P. C. 312.

(*h*) Doe d. Nash *v.* Roe, 8 Dow. P. C. 305.

Service upon the wife of one of two joint tenants will not bind the co-tenant (*a*).

When the service is on a member of the family the rule is, that it must appear from the affidavit of service that the declaration was delivered to the party served before the first day of the Term, and that the tenant has subsequently acknowledged that he received the declaration or knew of its contents before such first day; that is to say, in other words, that the tenant was himself served through the medium of the member of his family in due time (*b*). In accordance with the principle of this rule, if the acknowledgment of the tenant should be that he received the declaration on a Sunday, it will not be sufficient, because service upon him on that day by the lessor himself would be void (*c*).

There are only two reported cases in which the Courts have so far deviated from this wholesome and intelligible rule as to grant rules absolute in the first instance, where the service has been upon a member of the family and not acknowledged by the tenant to have been received by him before the first day of Term. In one of these cases the tenant was ill, and the daughter took the declaration up stairs, and when she returned said she had read and explained it to her father (*d*); in the other, the tenant afterwards came to the attorney of the lessor of the plaintiff, and said he knew the time was coming when "something must be done" (*e*). But there are several cases in which, from circumstances, the Courts have been induced to grant rules nisi, and the principle seems to be that such

(*a*) Wood. L. & T. 463.

(*b*) Roe d. Hambrook v. Doe, 14 East, 441; Doe d. Macdougall v. Roe, 4 B. Moore, 20; Doe d. Halsey v. Roe, 1 Chitty, 160; Doe d. Tindall v. Roe, 2 Chitty, 180; Right d. Freeman v. Roe, 2 Chitty, 180; Doe v. Roe, 5 B. & C. 764; Doe d.

Durant v. Roe, 8 Scott, 459.

(*c*) Doe v. Roe, 5 B. & C. 764; Doe d. Warren v. Roe, 8 D. & R. 342.

(*d*) Doe d. Cockburn v. Roe, 1 Dow. P. C. 692.

(*e*) Doe d. Agar v. Roe, 6 Dow. P. C. 624.

rules will be granted when the Court has reasonable grounds for inference that the declaration did reach the tenant's hands before the first day of Term, although there is no direct proof of the fact.

The following illustrations of this principle will be found in reported cases. Where the service was on the son, who said his father was ill and unable to attend to business, accompanied by an admission of the wife that her husband had received the declaration (*a*). Where the party having served the son, met the tenant and told him what he had done, and the tenant said, "then there is no time to lose" (*b*). Where the son said, "my father came home the same night, and I gave him the declaration" (*c*). Where after service upon the son, a summons for particulars was taken out by the tenant's attorney (*d*). Where a daughter-in-law said, "she had delivered the declaration to her father-in-law, who said he would instruct an attorney" (*e*). Where the service was on the daughter, and the wife acknowledged before the first day of Term that the declaration had come to her husband's hands (*f*). Where the tenant was bed-ridden, and the service was on the daughter on the premises (*g*). Where the service was on the son on the premises, and it clearly appeared that the tenant was keeping out of the way to avoid service (*h*). Where the tenant was in America and the son managed his business (*i*). Where the tenant was at home and refused to be seen (*j*). Where the service was on a servant, and the tenant's attorney

(*a*) Anon. Chitty, 182; Doe d. Messier *v.* Roe, 5 Dow. P. C. 716. Dow. N. S. 543; Doe d. Chaffey *v.* Roe, 9 Dow. P. C. 100.

(*b*) Doe d. Brickfield *v.* Roe, 1 Dow. N. S. 270.

(*g*) Doe d. Frost *v.* Roe, 8 Dow. P. C. 301.

(*c*) Doe d. Timmins *v.* Roe, 6 Dow. P. C. 765.

(*h*) Doe d. Luff *v.* Roe, 3 Dow. P. C. 575.

(*d*) Doe d. Evans *v.* Roe, 2 Dow. N. S. 334.

(*i*) Doe d. Potter *v.* Roe, 2 Scott, 378.

(*e*) Doe d. Sykes *v.* Roe, 7 Scott, 121.

(*j*) Doe d. Moody *v.* Roe, 8 Dow. P. C. 306.

(*f*) Doe d. Morgan *v.* Roe, 1

acknowledged that the declaration had been received (*a*). Where the tenant refused to make any acknowledgment, but referred to his attorney, who also refused to make any (*b*). Where the servant was desired to deliver the declaration to his master, and he stated that he had done so (*c*), and the like. And in all cases of this character, if cause be shown against the rule, the Court will require the affidavits to state affirmatively, that the tenant did not receive the declaration before the first day of Term (*d*).

Notwithstanding the above decisions, in the great majority of which the affidavits in support of the rules contain no affirmative statement either by the acknowledgment of the tenant or otherwise, that the declaration reached his hands before the first day of Term, it is very doubtful upon the reported cases whether a mere acknowledgment by the tenant *himself* that he has received the declaration, unaccompanied by an admission, that such receipt was before the first day of Term (although such acknowledgment should be made on the first day of Term) is a sufficient foundation even for a rule to shew cause. The decisions nearly balance in point of number, but the good sense seems to be with the minority, which hold that if the service be upon a member of the family in due time and the tenant acknowledge that it has reached his hands, it is sufficient to justify the Court in calling upon him to show affirmatively the time when he did receive it (*e*). It is sin-

(*a*) Doe d. Teverell *v.* Snee, 2 D. & R. 5.

(*b*) Doe d. Elderton *v.* Roe, 1 Dow. N. S. 585.

(*c*) Doe d. Jones *v.* Roe, 1 M. & Scott, 597.

(*d*) Doe d. Protheroe *v.* Roe, 4 Dow. 385.

(*e*) Sufficient—Doe d. Smith *v.* Roe, 4 Dow. P. C. 265; Doe d. Figgins *v.* Roe, 2 M. & G. 294; Doe d. Gibbard *v.* Roe, 3 M. &

G. 87; Doe d. Notting *v.* Roe, W. & D. 69. Insufficient—Doe d. Emsley *v.* Roe, 1 M. & G. 87; Doe d. Finch *v.* Roe, 5 Dow. P. C. 225; Doe d. Marshall *v.* Roe, 2 Ad. & Ell. 588; Doe d. Tindale *v.* Roe, 2 Chitty, 180; Doe d. Macdougall *v.* Roe, 4 Moore, 20; Doe *v.* Roe, 1 D. & R. 563; Roe d. Hambrook *v.* Doe, 14 East, 441; Doe d. Martin *v.* Roe, 1 Har. & W. 46; Anon. 2 Chitty, 87.

gular that in this conflict of cases it should have been ruled, that an acknowledgment by a member of the family, that she has given the declaration to the tenant, unaccompanied by a statement of the time when she so gave it, is sufficient to call upon the tenant to state affirmatively the time of its receipt, whatever doubts may exist as to the effect of such an acknowledgment by the tenant himself (*a*).

When due service is prevented by fraud or violence, the Courts will generally grant rules absolute in the first instance, and at all times rules to shew cause ; but in addition to a statement of the particular facts of fraud or violence, it is always required that the affidavit should state affirmatively that the declaration was affixed to, or left upon the demised premises. Affidavits containing such statements, and stating also facts similar in character to the following, namely, that in deponent's belief the tenant was at home, but was denied for the purpose of avoiding service (*b*) ; that the door of the house was locked, but that deponent saw the niece through the window, and it appeared by conversations, that the declaration was afterwards brought to the plaintiff's attorney (*c*) ; that the tenant, or it seems his wife (*d*), had refused to receive the declaration, whereupon deponent left it on a chair, explaining the nature and object of the service (*e*) ; that the declaration and notice were passed under the door, the party refusing to open it, or listen to any explanation of its nature and object (*f*) ; that the son was duly served on the premises, and stated that his father was gone out and would not return until midnight, accompanied by a statement on the next day from the wife, that the husband had returned but was again gone out, she did not

(*a*) Doe d. Threader *v.* Roe, 1 Dow. P. C. 441.
Dow. N. S. 261.

(*b*) Doe d. Turncroft *v.* Roe, 1 Har. & W. 371.

(*c*) Doe d. Mortlake *v.* Roe, 2 Dow. P. C. 444.

(*d*) Doe d. Courthorpe *v.* Roe, 2

(*e*) Doe d. Visger *v.* Roe, 2 Dow. P. C. 449.

(*f*) Doe d. Lowndes *v.* Roe, 7 Mee. & W. 439 ; Doe d. Lord Summers *v.* Roe, 5 Dow. P. C. 552.

know where (*a*), and the like (*b*), have been held sufficient for rules absolute or rules to shew cause according to the disposition of the presiding Judge.

When the premises are totally deserted, and there is no one upon whom service can be effected, the claimant must resort to the ancient practice, unless the case falls within the provisions of stat. 11 Geo. 2, c. 19, s. 16, and 57 Geo. 3, c. 52, when he must proceed as on a vacant possession (*c*).

But cases are not wanting in which this rule has been departed from. Thus where one part of the premises was vacant, and the residue in the occupation of tenants, service on the tenants, and affixing a declaration on the door of the unoccupied part has been held sufficient (*d*). And where a house had been kept locked up for four months, and no one had been seen to enter or come out of it, and it was impossible to see whether any goods were left on the premises (*e*), and where in an ejectment by a mortgagee, it was not clear that the premises were legally vacant, and the mortgagor was purposely keeping out of the way (*f*), affixing declarations on the doors of the premises have been held sufficient for rules *nisi*. In like manner a rule *nisi* was granted where the tenant and his family had embarked for America, and the service was by affixing a declaration to the door of the premises, and reading over and explaining the same on the premises to the servant of a tenant of another part of the premises (*g*).

(*a*) Doe d. Wetherell *v.* Roe, 2 *v.* Roe, 4 Moore, 350.
Dow. P. C. 441.

(*b*) Doe d. Croley *v.* Roe, 2 Dow. Moore, 469; Doe d. Handle *v.* Roe,
N. S. 345. 3 M. & W. 279; Doe d. Timothy

(*c*) Doe d. Norman *v.* Roe, 2 *v.* Roe, 8 Scott, 126.

Dow. P. C. 399, 428; Doe *v.* Roe, 4 Dow. P. C. 173; Doe d. Darlington, (Lord) *v.* Cock, 4 B. & C. 259;
D. 187

Doe d. Burrows *v.* Roe, 7 Dow. P. W. & D. 69.
C. 326; Doe d. Showell *v.* Roe, 3

Dow. P. C. 691; Doe d. Seabrook (*g*) Doe d. Osbaldiston *v.* Roe, 1
Dow. P. C. 456.

Where the declaration was tendered on the day before the first day of Term, but the defendant's servant said, he had orders not to receive any such thing, whereupon it was not then served, but was left at the house upon the day following, the Court refused the rule, saying, "We sometimes make that service, under particular circumstances, good, which otherwise would have been imperfect; but here there was no service on the proper day, and we cannot antedate the service" (a).

When the service is good for part, and bad for part, the lessor may recover those premises for which the service is good; but if he proceed for all, and obtain possession by means of a judgment against the casual ejector, the Court will compel him to make restitution of that part, for which the service was bad (b).

When a rule *nisi* for judgment against the casual ejector is served on persons who appear and show they are not in possession, and have no claim on the premises, they are entitled to the costs of being brought before the Court (c).

OF THE AFFIDAVIT OF SERVICE (d).

When the service of the declaration has been effected, the next step to be taken, in order to obtain judgment against the casual ejector, is to make an affidavit of such service; which affidavit is annexed to the declaration, and is the ground upon which the rule for judgment is to be moved for. In ordinary cases this motion is *of course*, that is to say, such only as requires counsel's signature; and the motion will not be received in Court unless there is something special in the service (e), but when any special circumstances exist, the rule

(a) Wood. L. & T. 466.

(d) Appendix, Nos. 16, 17, 18.

(b) Ibid. 463; Appendix, No. 41.

(e) Doe d. Welchon v. Roe, 5

(c) Doe d. Tonsley v. Roe, 1 M. & G. 490.

Dow. P. C. 271.

must be moved for as in other cases; and the motion may then be made, either before, or after the service of the declaration; although, if the lessor be aware of the obstacles he will have to encounter, it is better to move, prior to the service, for a rule to show cause, why a service of such a nature as shall be stated in the affidavit should not be sufficient (*a*).

The affidavit may be sworn before a Judge, or a commissioner, and should be regularly made by the person who served the declaration; although the Court have been satisfied with the affidavit of a person, who saw the declaration served upon, and heard it explained to the tenant in possession (*b*).

The affidavit should be entitled in the name of the casual ejector and not of the real defendant (*c*); and where there are several demises, it will be wrongly entitled if entitled "on the demise" of one only, without mentioning the others (*d*), or if entitled "on the demise or demises of *A.* and *B.* (*e*);" but an affidavit entitled "on the *several* demises of *A.*, *B.*, *C.*, and *D.*," where some of the demises were *joint* demises, has been held sufficient (*f*). And where the lessors are personal representatives, their character need not be noticed in the title of the affidavit (*g*).

The affidavit must state in addition to the facts incident to the service, which have been already fully commented upon in the preceding pages, that the notice annexed to the declaration (unless the tenant should happen to be an attorney (*h*)), was read and explained at the time of the

(*a*) *Methold v. Noright*, Blk. 290;
Gulliver v. Wagstaff, Blk. 317.

(*b*) *Goodtitled. Wanklen v. Bad-*
title, 2 B. & P. 120.

(*c*) *Anon.* 2 Chitty, 181.

(*d*) *Doe d. Cousins v. Roe*, 4 M.
& W. 68.

(*e*) *Doe d. Neville & Another v.*

Lloyd, 2 Dow. N. S. 330.

(*f*) *Doe d. Barles v. Roe*, 5 Dow.
P. C. 447.

(*g*) *Doe d. Jenks v. Roe*, 2 Dow.
P. C. 55.

(*h*) *Doe d. Duke of Portland v.*
Roe, 1 Dow. N. S. 183.

service, or generally that the tenant was informed of its intent and meaning (*a*), or satisfactory reasons given, why such reading and explanation did not take place (*b*).

If the affidavit only state that the notice was *read*, the service will not be sufficient (*c*); and where it was said, on the delivery of the declaration, "*This is an ejectment from Mrs. C. D. (d);*" as also where the expression was, "*This is an ejectment from Mrs. C. D., but it is not intended to turn you out of possession, but to get into the receipt of the rents and profits (d);*" the services were held not to be good (*d*); and an insufficient service of this kind will not be aided by an explanation after the first day of Term of its nature and meaning (*d*). But if the tenant acknowledge that he understands the meaning and intention of the service, it will be good, without any such reading or explanation (*e*). And an affidavit has been held sufficient which merely stated that the tenant appeared to be acquainted with the intent of the declaration, without stating that it had been either read or explained to him (*f*).

In a case where it was alleged in the affidavit of service that the declaration "was *read over* to the tenant," without alleging also that it was explained, Patteson, J., is reported to have said, "That will do; it has also been held, that explanation without reading over will suffice. Rule granted;" and in another case upon an allegation precisely similar, Tindal, C. J. is reported to have said, "We had better not get into a new

(*a*) Doe d. Scriven *v.* Roe, 1 W. & H. 584.

(*b*) Doe d. George *v.* Roe, 3 Dow. P. C. 541.

(*c*) Doe d. Whitfield *v.* Roe, K. B. T. T. 1815, MS.; Doe d. Wade *v.* Roe, 6 Dow. P. C. 51.

(*d*) Doe d. Edwards *v.* Roe, K.

B. H. T. 1821, MS.

(*e*) Doe d. Quintin *v.* Roe, K. B. T. T. 1816, MS.; Doe d. Stone *v.* Roe, 3 Hodges, 14; Doe d. Jones *v.* Roe, 1 Dow. P. C. 518.

(*f*) Doe d. Downes *v.* Roe, 4 Dow. P. C. 565.

form of affidavit. These proceedings are very unintelligible to common people. Rule refused (*a*)."

The affidavit must be positive that the person served was the tenant in possession (*b*), or that he acknowledged himself to be so (*c*). It will not be sufficient to swear inferentially, as for example, that deponent "served the tenant in possession by serving *A. B.* (*d*)," or to disclose facts from which a legal inference may be drawn that the party served is the tenant in possession (*e*); nor to qualify the possession of the party served by stating that the service was upon him as executor or the like (*f*).

An affidavit that deponent did serve *A. B.* tenant in possession, *or his wife*, is not sufficiently certain as to either (*g*). So also affidavits, that the deponent did serve the wives of *A.* and *B.* who, or one of them, are tenants in possession (*h*), that he served the *person* in possession (*i*), that he served *the occupier* (*k*), and that he served *A. B.* whom *he verily believed* to be the tenant in possession (*l*), have been held insufficient.

When the party served as tenant in possession appears to the action, the Court will not set aside his appearance, on a suggestion by the lessor of the plaintiff that he has no interest in the premises (*m*).

(*a*) *Doe v. Roe*, 1 Dow. P. C. 428; *Doe d. Wade v. Roe*, 6 Dow. P. C. 51.

(*b*) *Doe v. Roe*, 1 Chitty, 574.

(*c*) *Anon.* 1 Barnard. 330; *Goodtitle v. Davis*, 1 Barnard. 429.

(*d*) *Doe d. Dalby v. Hitchcock*, 2 Dow. N. S. 1.

(*e*) *Doe d. Jones v. Roe*, 5 Dow. P. C. 226.

(*f*) *Doe v. Roe*, 2 Tyr. 158.

(*g*) *Birkbeck v. Hughes*, Barn. 173.

(*h*) *Harding d. Baker v. Green-smith*, Barn. 174.

(*i*) *Doe d. Robinson v. Roe*, 1 Chitty, 118; *Doe d. Fraser v. Roe*, 5 Dow. P. C. 720.

(*k*) *Doe d. Jackson v. Roe*; 4 Dow. P. C. 609.

(*l*) *Doe v. Badtitle*, 1 Chitty, 215; *Doe d. George v. Roe*, 3 Dow. P. C. 22.

(*m*) *Doe d. Turner v. Gee*, 9 Dow. P. C. 612.

If several persons be in possession of the disputed premises, and separate declarations in ejectment be served upon them, one affidavit of the service upon all, annexed to the copy of one declaration, is sufficient, provided one action of ejectment only be intended (*a*); but if the ejectments are made several, so as to have separate judgments, writs of possession, &c., then separate affidavits, of the several services upon the different tenants, must be annexed to copies of the several declarations respectively (*b*).

When one action only is intended, the names of *all* the tenants are generally prefixed to each notice; but where the name of the individual tenant alone, upon whom each particular declaration was served, was prefixed to the notice to such declaration, so that it could not be sworn, that a copy of any *one* declaration and notice had been served on *all* the tenants, the Court, notwithstanding, thought one rule sufficient (*c*); but where in a case in other respects similar, no name whatever was introduced in the notice appended to the copy of the declaration annexed to the affidavit of service, the Court refused the rule (*d*).

An affidavit stating the deponent had *personally* served *A., B., C., and D., the four* tenants in possession with true copies of the declaration, &c.,” has been held insufficient, because it was not sworn specifically that *each* tenant had been *personally* served. The only mode of rendering this decision intelligible is, by assuming that the word *personally* in the affidavit must have been taken to refer to the *deponent* and not to the *tenants* (*e*).

(*a*) Appendix, No. 17.

(*b*) 2 Sell. Prac. 100.

(*c*) Roe d. Burlton v. Roe, 7 T. R. 477.

(*d*) Doe d. Ludford v. Roe, 8 Dow. P. C. 500.

(*e*) Doe d. Levi v. Roe, 7 Dow. P. C. 102.

When an affidavit of service is defective, the Court will not grant a rule upon an undertaking that a supplemental affidavit shall be made remedying the defect; but upon obtaining such supplemental affidavit, the rule may be moved for as in ordinary cases (*a*).

Where the proceedings are under stat. 4 Geo. II. c. 28, the affidavit must be positive that there is no sufficient distress upon the premises, the deponent's "belief" will not be sufficient (*b*).

When the action is founded on stat. 1 Geo. IV. c. 87, s. 1, instead of moving for judgment in the ordinary way, the lessor should be prepared with the affidavits required by that statute, in addition to the usual affidavit of service; and the motion should be for a rule to show cause "why the party should not undertake, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, to give the plaintiff judgment, in case he obtain a verdict, of the Term next preceding the trial; and why he should not enter into a recognizance by himself and two sufficient sureties, in a sum to be named by the Court, to pay the costs and damages which may be recovered in the action."

When the claimant proceeds upon the stat. 1 Wm. IV. c. 70, s. 30, it must be sworn, in addition to the usual affidavit of service, that the relation of landlord and tenant subsisted between the lessor and the party in possession, and that the interest of the latter expired within ten days next before the service of the declaration.

When the affidavit was sworn on June 8, 1840, and

(*a*) *Jenny d. Preston v. Cutts*, 1 N. R. 308; *Goodtitle d. Sandys v. Badtitle*, K. B. T. T. 1819, MS.

(*b*) *Doe v. Roe*, 2 Dow. P. C.

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stated the service to have been made "on May 26," without saying "last," or mentioning any year, it was considered insufficient (*a*).

OF JUDGMENT AGAINST THE CASUAL EJECTOR.

The declaration having been duly served and the affidavit of service prepared, the next step to be taken in the cause by the lessor of the plaintiff is to move for judgment against the casual ejector; that is to say, that the plaintiff shall be at liberty to sign judgment by default unless the party interested shall appear to the action and plead to issue within the time limited in the rule (*b*). These motions, unless there be something special in the service of the declaration, are motions of course, requiring only the signature of counsel, and will not be received in Court, but must be taken at once to the proper officer to draw up the rule. If, however, any special circumstances do exist, the rule must be moved for as in other cases.

Much diversity and some complexity formerly prevailed, with respect to the practice of the different Courts as to the time of moving for these judgments, and also as to the time for the appearance of the parties interested, but the practice is now much simplified and uniform in all of them.

With respect to the time of moving for judgment against the casual ejector, the motion ought regularly to be made during the Term in which the tenant is directed to appear by the notice at the foot of the declaration; but the motion may notwithstanding be made at any time during the Term next following such Term (*c*), (but not afterwards) (*d*), though it is

(*a*) *Doe d. Foster v. Roe*, 8 Dow. P. C. 784.

(*b*) Appendix, No. 20, 21, 22.

(*c*) *Doe v. Roe*, 2 Tyr. 724; 2 Dow. P. C. 196; *Doe d. Barth v. Roe*, 4 Bing. N. C. 675; *Doe d.*

Walker v. Roe, 9 M. & W. 426; *Doe d. Wilson v. Roe*, 4 Dow. P. C. 124; *Doe d. Fell v. Roe*, 1 Dow. N. S. 777.

(*d*) *Doe v. Roe*, 1 Dow. P. C. 495.

somewhat doubtful upon the authorities whether if the motion be so delayed the Courts will grant a rule absolute in the first instance (*a*). With respect to the time of appearance the rules are as follows:—

In town causes, that is to say, when the premises are situated in London or Middlesex, if the notice be to appear within the first four days of Term, and the rule be moved for before the last four days, the tenant must appear within four days after the time of moving; but if the motion be not made until within the last four days of Term, then the tenant need not appear until two days before the next Term.

If in town causes the notice be to appear of the Term generally, and the rule for judgment be moved for early in the Term, the tenant has until the last day of such Term to appear, but if the motion be not made until within the last four days of Term, the practice as to the time of appearance is the same as if the notice had been to appear on the first day of Term.

In country causes, that is to say, when the premises are situated elsewhere than in London or Middlesex, the tenant must always appear within four days after the Term in which the rule for judgment is obtained, whether the notice be to appear of that Term generally, or within the first four days thereof, or of the Term next before the Term in which the motion is made.

When the action is brought under the provisions of the stat. 1 Wm. IV. c. 70, s. 36, the tenant must in all cases enter his appearance within ten days after the delivery of the declaration.

(*a*) Right d. Jeffery *v.* Wrong, 2 Dow. P. C. 348; Doe d. Wilson *v.* Roe, 4 Dow. P. C. 124; Doe d. Wiggs *v.* Roe, 5 Dow. P. C. 662; Doe d. Croome *v.* Roe, 6 Dow. P. C. 270; Doe d. The Earl of Warwick *v.* Roe, 9 Dow. P. C. 714.

The rule for judgment against the casual ejector must in all cases be drawn up, and taken away from the office of the clerk of the rules, within two days after the end of the Term in which the rule has been obtained, or no further proceedings can be had in the action (a).

By a late rule of Court, the party entitled to appear has now the privilege of appearing and pleading to the action in town causes, at any time after the service of the declaration, and before the end of the fourth day of the Term in which he is required by the notice to appear, and in country causes before the end of the fourth day after the Term in which he is required to appear, although the plaintiff may not have obtained a rule for judgment against the casual ejector (b), and may also proceed to compel the plaintiff to reply or sign judgment of *non pros*. And a plaintiff, who has omitted to obtain a rule for judgment within the prescribed time is in return privileged on the production of such plea, to an order of a Judge for leave to draw up a rule for judgment, as of the time at which such rule would have been regularly obtained (c).

When the time appointed for appearance is expired, it is not necessary to give a rule to plead, or to enter an appearance for the defendant (d), but judgment may be at once signed against the casual ejector (e), but such judgment must not be signed until the day next after that on which the rule expires; and if Sunday happen to be the last day, not until Tuesday (f). If also the lessor delays to sign judgment for upwards of a

(a) Reg. Gen., M. Term, 31 Geo. 3.

(b) This rule does not include in terms town causes in which the notice is to appear of the Term generally; but it is probable that the Courts would hold them to be within its equity, and allow the defendant to appear and plead

within four days *after* the Term as in country causes.

(c) Reg. Gen., H. T. 4 Vic.; 1 Q. B. R. 1.

(d) Doe d. Morgan v. Roe, 2 M. & W. 423.

(e) Appendix, No. 23.

(f) Hyde d. Culliford v. Thrustout, Sayer, 303.

year, the tenant will be entitled to a Term's notice before judgment can be signed (*a*).

When the action is against several tenants in possession, and the notice at the foot of the declaration is addressed to all of them, and each tenant is served with a copy addressed to all, there should be only one rule for judgment against the casual ejector (*b*).

Judgments against the casual ejector irregularly obtained, will, as a matter of course, be set aside, if the application be made at the proper time (*c*); and as the situations of claimant and defendant in ejectment are materially different, the Courts are liberal in their rules for setting aside such judgments, although regularly signed, provided the application be made before execution. And they will also grant them in special cases after execution executed, as for example if collusion appears to have existed between the lessor and the tenant (*d*), or if the omission to appear arises from the inadvertence of the attorney (*e*); but they are of course more stringent as to granting these rules after the possession is changed, than whilst the parties continue in the relative positions they occupied at the commencement of the proceedings (*f*).

The regular mode of setting aside such judgments is by rule of Court, for the party having obtained the judgment to give

(*a*) Doe d. Vernon *v* Roe, 7 Ad. & Ell. 14.

(*b*) Doe d. Vorley *v* Roe, 2 Dow. N. S. 52.

(*c*) Doe d. Parr *v* Roe, 1 Q. B. R. 700.

(*d*) Goodtitle *v* Badtitle, 4 Taunt. 820; Doe d. Grocers' Company *v* Roe, 5 Taunt. 205; Doe d. Thomson *v* Roe, 4 Dow. P. C. 115; *vide*

contra Doe d. Troughton *v* Roe, Burr. 1996; Dobbs *v* Passer, Stran. 975; Mason d. Kendale *v* Hodgson, Barn. 250.

(*e*) Doe d. Mullarkey *v* Roe, 11 Ad. & Ell. 333; Doe d. Shaw *v* Roe, 13 Price, 260.

(*f*) Doe d. Ledger *v* Roe, 3 Taunt. 506.

up the possession; but if the circumstances of the case require it, the Courts will order a writ of restitution to be issued (*a*).

When a party obtains possession under an irregular judgment, the order for the restoration of the possession to the defendant should be made upon the party in possession, and not upon the sheriff; and it would seem that a Judge at Chambers has no power to order a writ of restitution (*b*).

Where a party having been permitted to defend alone, as landlord, died before the trial of the cause, devising his real estates to *B.*, and the lessor (having committed no wilful delay,) was prevented by the Statute of Limitations from bringing a fresh ejectment, the Court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless *B.* would appear and defend as landlord (*c*).

(*a*) Goodright d. Russell *v.* No-right, Barn. 178; Davies d. Povey *v.* Doe, Blk. 892; Appendix, No. 41.

(*b*) Doe d. Williams *v.* Williams, 2 Ad. & Ell. 381.

(*c*) Doe d. Grubb *v.* Grubb, 5 B. & C. 457.

CHAPTER VIII.

Of the Appearance—Plea—and Issue.

IN the preceding Chapter, the proceedings on the part of the claimant have been considered, and the suit conducted to its termination, when no appearance is entered in pursuance of the notice subscribed to the declaration. We must now consider the proceedings on the part of the tenant in possession, and point out the persons who may appear and defend the action, in what manner such appearance should be made, and the other steps necessary to be taken to bring the question to trial.

Notwithstanding the power possessed by the Courts of framing rules for the improvement of this remedy, the interference of the Legislature has at times been called for, and it has been most beneficially exerted in regulating the appearances to the action. The tenant in possession, being the person *primâ facie* interested, is, of course, the party on whom the declaration is always served; although it frequently happens in practice, that the lands belong to some third person out of possession, to whom such service can afford no information of the proceedings against him, and who by the common law has no remedy against his tenant if he omit to give him notice of them. By the rules and practice of the Courts also, for it would scarcely be correct to say by the common law, the landlord it seems was not permitted to defend, even when he did receive notice, unless the tenant consented to become a co-defendant with him (a); and no means existed by which

(a) Lill. Pr. Reg. 674.

the tenant could be compelled to appear, and be made such co-defendant (*a*). This system occasioned great inconvenience to landlords. The tenants from negligence, or fraud, frequently omitted to appear themselves, or to give to the landlords the necessary notice; and although judgments against the casual ejector have been set aside, upon affidavits of circumstances of this nature, the remedy was still very incomplete (*b*).

To remedy these imperfections, the Courts are authorized by 11 Geo. II. c. 19, s. 13, to suffer the landlord to make himself defendant by joining with the tenants in case they shall appear; but in case they shall refuse, or neglect to appear, and the landlord shall desire to appear by himself, the Court shall permit such landlord so to do, judgment being first signed against the casual ejector, and order a stay of execution upon such judgment until they shall make further order therein.

By the 12th section of the same statute it is also enacted, "That every tenant, to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to his landlord, bailiff, or receiver, under the penalty of forfeiting the value of three years' improved, or rack-rent of the demised premises to be recovered by action of debt."

This latter section has been interpreted to extend only to those cases, in which the ejectments are inconsistent with the landlord's title. Thus, a tenant of a mortgagor, who does not give him notice of an ejectment, brought by the mortgagee upon the forfeiture of the mortgage, is not within the penalties of the clause (*c*).

The first enactment in the thirteenth section of this statute, namely, that landlords may be made defendants by joining

(*a*) *Goodright v. Hart*, Stran. 880.

(*b*) *Anon.* 12 Mod. 211.

(*c*) *Buckley v. Buckley*, 1 T. R.

647.

with the tenants in possession, is decidedly only a legislative sanction of the previous uniform practice of the Courts; and it is also said, by Wilmot, J., in the case of *Fairclaim d. Fowler v. Shamtitle* (*a*), that landlords were permitted before this statute to defend ejectments without joining the tenants in possession. There is indeed but one case extant in which the contrary doctrine is maintained (*b*); and the loose notes to be found of cases previous to that decision certainly favour Mr. J. Wilmot's opinion (*c*). It is therefore probable, that the practice was not clearly settled until the time of such decision, and that the statute was enacted in consequence of the inconvenience resulting from it (*d*).

By the words of the statute the Courts can admit *landlords* only to defend, and difficulties have frequently arisen, as to the meaning of the word *landlord* in the act, and as to what interest in the disputed premises will be sufficient to entitle a person claiming title, to appear and defend the action.

In the first reported case upon the construction of this section, it was holden, that it was not every person *claiming title*, who could be admitted to defend as landlord, but only he, who had been in *some degree in possession*, as receiving rent, &c.; and upon this principle, the Court would not allow a devisee claiming under one will to defend as landlord in an ejectment, brought by a devisee claiming under another will of the same testator (*e*). But this doctrine was afterwards reprobated by Lord Mansfield, in a case where the principles of the section were fully considered, and the decisions, anterior to the act, investigated and explained.

(*a*) Burr. 1301.

(*b*) *Goodright v. Hart*, Stran. 830.

(*c*) *Lamb v. Archer*, Comb. 208 ;
Anon. 12 Mod. 211.

(*d*) *Fairclaim d. Fowler v. Shamtitle*, Burr. 1290, 1298.

(*e*) *Roe d. Leak v. Doe*, Barn. 193.

“There are (says Lord Mansfield) two matters to be considered. First, whether the term ‘*landlord*,’ ought not, as to this purpose, to *extend* to *every* person whose title is connected to, and consistent with, the possession of the occupier, and divested, or disturbed, by any claim adverse to such possession, as in the case of remainders, or reversions, expectant upon particular estates: secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*, so as to prevent *either* from recovering by collusion with the occupier, without a *fair trial* with the *other*. Where a person claims in *opposition* to the title of the tenant in possession (*a*), he can in *no* light be considered as landlord: and it would be unjust to the tenant, to make *him* a co-defendant: their defences might *clash*. Whereas, where there is a *privity* between them, their defence must be upon the *same bottom*: and letting the person in behind, can only operate to prevent treachery and collusion. It is no answer, “that any person affected by the judgment may bring a new ejectment;” because there is a great difference between being *plaintiff*, or *defendant*, in ejectment (*b*).”

(*a*) Driver d. Oxendon v. Lawrence, Blk. 1259.

(*b*) Fairclaim d. Fowler v. Shamtitle, Burr. 1290, 94. The principles laid down by Lord Kenyon, C. J., in the case of Lovelock d. Norris v. Dancaister (3 T. R. 783), seem to support the doctrine of Lord Mansfield, above mentioned; although, from the omission, in the report of the case, of the facts upon which Lord Kenyon’s judgment was founded, the point cannot be clearly ascertained.

It was moved, that the *cestui que trust* might be made defendant in ejectment instead of the tenant, and objected to on the opposite

side, because he had never been in possession, and could not be considered as a *landlord* under the statute 11 Geo. II. c. 19, s. 13.

Lord Kenyon, C. J. “If the person requiring to be made a defendant under the act had stood in the situation of immediate heir to the person last seised, or had been in the relation of remainder-man, under the same title as the original landlord, I am of opinion that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself is, whether he is entitled to be

The judgment in this case was not, indeed, ultimately given upon these points; but the principle upon which the statute is to be interpreted, seems to have been established by it; and we may now consider, that the word *landlord* is extended to all persons claiming title, consistent with the possession of the occupier: and that it is not necessary they should previously have exercised any act of ownership over the lands. Thus, the Courts have permitted an heir, who had never been in possession, to defend where the father, under whom he claimed, had died just before, having previously obtained the same rule (*a*). So a devisee in trust, not having been in possession, was permitted to defend (*b*), and a mortgagee has been made defendant with the mortgagor (*c*); but in a recent case, the Court refused to permit a mortgagee to defend, because it did not appear that he was interested in the result of the suit (*d*).

If a party should be admitted to defend as landlord whose title is inconsistent with the possession of the tenant, the lessor may apply to the Court, or to a Judge at Chambers, and have the rule discharged with costs (*e*). If, however, he neglect to do so, and the party continue upon the record as defendant, such party will not be allowed to set up such inconsistent title as a defence at the trial (*f*).

landlord or not; and therefore we are not authorised to extend the provision of the statute to such a case as this." The rule was discharged.

(*a*) Doe d. Heblethwaite v. Roe, cited 3 T. R. 783.

(*b*) Lovelock d. Norris v. Dan-caster, 4 T. R. 122.

(*c*) Doe d. Tilyard v. Cooper, 8 T. R. 645. It does not appear, from the report of this case, whether the mortgagee had previously

received any rent; but, from the principles above laid down, the circumstance seems immaterial. (*See vide* B. N. P. 95).

(*d*) Doe d. Pearson v. Roe, 6 Bing. 613.

(*e*) Doe d. Harwood v. Lippen-cott; Coram Wood, B. Trin. Vac. 1817, MS.; Doe d. Horton v. Rys, 2 Y. & J. 88.

(*f*) Doe d. Knight v. Lady Smythe, 4 M. & S. 447; Doe d. Mee v. Litherland, 4 Ad. & Ell. 784.

In the time of Lord Mansfield the Court of King's Bench, in a case which has already been frequently cited, threatened to exercise a stringent act of equitable jurisdiction, with respect to the admission of a person claiming title, to defend an ejectment. The action was brought by one, claiming as the heir of a copyholder; and the lord of the manor, claiming by escheat *pro defectu hæredis*, obtained a rule to show cause, why he should not be admitted defendant. After considerable argument as to the legality of the lord's claim to defend, it was agreed by both parties, at the recommendation of the Court, that the then ejectment should be discontinued, and a fresh one brought in the lord's name, in which the heir should be admitted defendant: and Lord Mansfield, C. J. declared afterwards, that if the heir had refused to consent to this arrangement, they would have admitted the lord to defend, and that if the lord had refused his consent, they would have discharged the rule (*a*).

A wife has been permitted to defend, where the title of the plaintiff's lessor arose from a pretended intermarriage with her, which marriage she disputed (*b*).

But a parson claiming a right to enter, and perform divine service, has been held not to have a sufficient title to be admitted defendant (*c*); and, where the application for admission appeared only a device to put off the trial, the Court refused to grant a rule (*d*).

It may be useful to observe, that it is not necessary for the landlord to be made defendant in order to make his title admissible in evidence; but that he may with the tenant's

(*a*) Fairclain d. Fowler v. Sham-title, Burr. 1290.

(*b*) Fenwick v. Gravenor, 7 Mod. 71.

(*c*) Martin v. Davis, Stran. 914; *vid. con.* Hillingsworth v. Brewster, Salk. 256.

(*d*) Fenwick's case, Salk. 257.

consent defend in the tenant's name. And where a suit was so defended, and the lessor of the plaintiff, having knowledge thereof, obtained from the tenants a *retraxit* of the plea, and a *cognovit* of the action, the Court directed the judgment to be set aside (a).

Where the party served as tenant in possession appears to the action, the Court will not set aside such appearance, on an affidavit of the claimant, that such party has no interest in the premises, if he swear in answer, that he is the under lessee of the parties who are represented by the lessor as the parties really interested (b).

It may here be observed, that when several tenants are in possession, to whom the claimant delivers declarations for different premises, the Court will not join them in one action, on the motion of either party, although the claimant has but one title to all the lands; for, if the motion be made on the part of the plaintiff, the Court will object, that each defendant must have a remedy for his costs, which he would not have if all were joined in one declaration, and the plaintiff prevailed only against one of them; and, if it be made on the part of the defendants, that the lessor might have sued them at different times, and it would be obliging him to go on against all, when perhaps he might be ready against some of them only (c). But where several ejectments are brought for the

(a) Doe d. Locke v. Franklin, 7 Taunt. 9.

(b) Doe d. Turner v. Gee, 9 Dow. P. C. 612. It is difficult to understand, how the Court can in any case set aside an appearance of a party on whom a declaration has been served as *tenant in possession*, unless it is prepared to try the merits upon affidavit. It would seem that the true principle of the above case is not the one drawn from it;

but the following, namely, that when there are *two* tenants in possession, one tenant shall not be permitted to appear for the premises in possession of the other tenant, because the claimant has served the declaration upon him in respect of such tenant, as well as for the premises in his own possession.

(c) Medlicot v. Brewster, 2 Keb. 524; Smith v. Crabb, Stran. 1149.

same premises, upon the *same demise*, the Court on motion, or a Judge at his Chambers, will order them to be consolidated (a); and although, where the premises are different, the Court will not consolidate the actions, yet where on a rule to show cause why the proceedings in all the causes (which were thirty-seven in number, and brought against the several inhabitants of the houses in Sackville-street) should not be stayed, and abide the event of a special verdict in one of them, as they all depended upon the same title, Lord Kenyon, C. J. said it was a scandalous proceeding on the part of the claimant, and the rule was made absolute (b).

Thus far as to who may appear, we must now consider how the appearance should be made, and the conditions upon which it is allowed.

The appearance should, in all cases, be entered of the Term mentioned in the notice; and where the notice was to appear in Hilary Term, and the tenant entered an appearance in Michaelmas Term, and did nothing farther, and the plaintiff's lessor, finding no appearance of Hilary Term, signed judgment against the casual ejector, the Court held the judgment regular, but afterwards set it aside upon payment of costs, to try the merits (c).

When the party who wishes to be made defendant is not the tenant, or *actual* landlord, but *has some interest to sustain*, the Court must be moved, on an affidavit of the facts, to permit him to defend with, or without, the tenant, as the case may require.

When the actual landlord appears either jointly with the tenant or alone, counsel's signature is requisite to a motion

(a) Grimstone d. Lord Gower v. Burghers, Barn. 176; Roe d. Burlington v. Roe, 7 T. R. 477.

(b) 2 Sell. Prac. 144.

(c) Mason d. Kendall v. Hodgson, Barn. 250.

(which is motion of course, and must be annexed to the consent rule) to admit the landlord and tenant, or landlord only, to defend; accompanied also, when the landlord appears alone, with an affidavit of the tenant's refusal to appear (*a*).

Where the tenant appears alone no motion is necessary; and it will be only necessary for the attorney to prepare a consent rule, and entitle it in the margin with the names of the plaintiff and casual ejector, inserting also therein, in all cases, with as much accuracy as he can, such part of the premises described in the declaration, as he wishes to defend for, and stating in the body the consent of both parties that the tenant be made defendant. He must then sign his name to this paper, which is called the agreement for the consent rule, and take it with the memorandum of appearance to the proper officer for entering appearances, who marks it with the seal of office to denote an appearance is entered, and then delivers it, together with a plea of the general issue, to the plaintiff's attorney, who may then sign the agreement, and take it to the office for rules of the Court in which the action is brought, who will draw up the consent rule thereupon (*b*): which consent rule is, in truth, a copy of the agreement, prefixing only the date of drawing it up, omitting the premises in the margin, and adding, "by the Court," instead of the attornies' names, at the end.

If the tenant refuse to appear, the landlord cannot appear in his name, nor appoint an attorney to do so for him, and an irregular appearance of this sort will be ordered to be withdrawn (*c*).

When the landlord is admitted to defend without the tenant, judgment must be signed against the casual ejector,

(*a*) *Hobson d. Bigland v. Dobson*,
Barn. 179; 2 Sell. Prac. 102; Ap-
pendix, No. 29.

(*b*) Appendix, No. 25.

(*c*) *Roe d. Cook v. Doe*, Barn.
39, 178.

according to the conditions of the consent rule. The reason for this practice is, to enable the claimant to obtain possession of the premises, in case the verdict be in his favour; because, as the landlord is not in possession, no writ of possession could issue upon a judgment against him.

By a recent rule of Court, the tenant may appear and plead within the usual time for appearing, although the claimant has not moved for judgment against the casual ejector; and he may move for judgment of *non pros.* : after he has so appeared and pleaded, although the claimant shall not have entered into the consent rule (a).

When it happens that the lessor of the plaintiff claims lands in the possession of different persons, and one of the tenants would be a material witness for the others, such tenant should suffer judgment to go by default, as to the part in his possession; because, if he appear, and be made a defendant, he becomes a party to the suit, and consequently cannot be a witness therein; and it seems that if he appear and plead, the Court will not afterwards strike out his name upon motion (b).

Where a party has appeared with others, and entered into the consent rule by mistake, and afterwards applies to have the appearance withdrawn and his name struck out of the rule on an affidavit that he is in possession of no part of the premises, the Court will grant the application on his undertaking to permit execution to issue for any part of the premises of which he *may* be in possession (c).

With respect to the conditions required from the party

(a) Doe d. Williams v. Smith, 9
Dow. P. C. 1011.

(b) B. N. P. 98.

(c) Doe d. Snape v. Snape, 1
Dow. 314.

appearing to the action before he is permitted to be made defendant, they are embodied in the consent rule, of which the form (a) and purposes have been already cursorily mentioned (b). The object of this rule is to insure a trial upon the merits, and to preclude either party from taking advantage of the fictitious proceedings in the action. It must be entered into by both parties, an attachment will lie against either party for disobedience of it, and it is in substance as follows. The person appearing specifies therein for what premises he intends to defend, and consents—Firstly, to be made defendant instead of the casual ejector. Secondly, to appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common bail. Thirdly, to receive a declaration in ejectment (c), and plead not guilty. Fourthly, at the trial of the issue to confess lease, entry, and ouster, and possession of the premises (d) in respect of which he defends (e), and insists upon title only. Fifthly, that if at the trial he shall not confess lease, entry, ouster, and possession, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros.*, and suffer judgment to be entered against the casual ejector. Sixthly, when the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution be stayed until the Court shall further order (f); and, Seventhly, where the proceedings are under stat. 1 Geo. IV. c. 87, to give judgment of the Term preceding the trial, in case a verdict shall pass for

(a) Appendix, No. 25.

(b) *Ante*, 14.

(c) The declaration, served upon the tenant to bring him into Court is the only declaration now delivered.

(d) In the case of *Doe d. Parr v. Roe*, 1 Q. B. Rep. 700, a corporation applied to be permitted to defend without admitting themselves

to be in possession, on the ground that the action was brought to enforce an *elegit* against their lands, and that as they only held them for public purposes, they were not liable to the execution. The Court rejected the application.

(e) Reg. Gen., H. T. 1 & 2 Geo. IV.

(f) Sel. N. P. 644.

the plaintiff: and the lessor of the plaintiff consents on his part that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, he (the lessor) shall pay costs to the defendant.

This consent rule will, in all cases, be sufficient to prevent a nonsuit for want of a real lease, and of a real entry and ouster. When, therefore, an ejectment is brought by a joint tenant, parcener, or tenant in common, against his companion (to support which an actual ouster (*a*) is necessary), the defendant must apply to the Court upon affidavit (*b*), for leave to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster also, unless an actual ouster of the plaintiff's lessor by him, the defendant, should be proved: and this special rule will always be granted (*c*), unless it appear that the claimant has been actually obstructed in his occupation (*d*). But this privilege is limited to the co-tenant himself, and will not be extended to his under-tenant (*e*).

The consent rule must admit the party to be in possession of something for which ejectment will lie. Thus, an admission that the defendant was in possession of "a certain tin-bound (setting out its abuttals) containing a certain mine, &c." was held insufficient, a tin-bound being a mere easement: the defence should be for the mine which the defendant is working under the tin-bound (*f*).

In a case where twelve defendants defended jointly, and

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| (<i>a</i>) <i>Ante</i> , 69. | 397. |
| (<i>b</i>) Appendix, No. 26. | (<i>e</i>) <i>Doe d. Wills v. Roe</i> , 4 Dow. |
| (<i>c</i>) Appendix, Nos. 27, 28. | P. C. 628. |
| (<i>d</i>) <i>Anon.</i> 7 Mod. 39; <i>Oates d.</i> | (<i>f</i>) <i>Doe d. Earl of Falmouth v.</i> |
| <i>Wigfall v. Brydon</i> , Burr. 1895; | <i>Alderson</i> , 1 M. & W. 210. |
| <i>Doe d. Ginger v. Roe</i> , 2 Taunt. | |

entered into a joint consent rule for part of the premises, not specifying the particular premises in possession of each defendant, and by an order of the Judge on the morning of the trial, the names of two of the defendants who had no valid defence for the portions in their respective possessions were struck out of the record, but no order was made for altering or amending the consent rule; and the trial went on, (the Judge refusing to nonsuit for want of the appearance or confession of the two defendants whose names were struck out) and the other ten established a defence, and had a verdict. It was held that the consent rule was not virtually amended by this order, and that consequently as the ten defendants had appeared for the premises in the possession of the two, as well as of those in their own possession, the plaintiff was entitled to a general verdict, and the general costs of the cause, limiting his execution to the premises in the possession of the two defendants, and paying to the ten defendants the costs of defending for the premises to which they proved title (*a*).

The present form of the consent rule precludes the necessity of proof at the trial of the possession by the defendant of the disputed premises, and as the consent rule is now annexed to the record, no questions can arise as to the necessity of its production as part of the plaintiff's case. It would seem, however, that such production, in case the plaintiff should omit to annex the rule to the record, is necessary in three cases, namely, when it appears by the evidence that the lessor of the plaintiff and the defendant are joint tenants, parceners or tenants in common, and no actual ouster is proved, when there is a contention at the trial that the defendant does not defend for the premises to which the plaintiff is directing his case (*b*), and when upon the defendant's refusal to confess, the lessor elects to proceed for the mesne profits under stat. 1 Geo. IV.

(*a*) Doe d. Bishton v. Hughes, 5 173; Doe d. Lamble v. Lamble, 1 Tyr. 957; 4 Dow. P. C. 412. M. & M. 237; Doe d. Greaves v.

(*b*) Doe d. White v. Cuff, 1 Camp. Raby, 2 B. & Ad. 948.

c. 87, s. 2. It appears also from a recent decision that the defendant may be called upon to confess lease, entry, and ouster, in the ordinary manner, although the consent rule shall not have been drawn up (*a*).

The consent rule may be drawn up, where the tenant has appeared and pleaded, although no rule for judgment against the casual ejector has been obtained (*b*).

It need not set out the Christian and surname of the lessor of the plaintiff (*c*).

When several tenants are in possession of the premises and the landlord defends alone, a separate consent rule must be entered into in each separate action; and if the landlord enters into one consent rule only, although such rule shall comprise all the disputed premises, the same may be treated as a nullity, and judgment signed against the casual ejector. In the particular case in which this rule was established, the number of tenants was thirteen, and the attorney comprised a certain number of them and a certain portion of the premises in each declaration, that is to say, *A. B. C.* and *D.* and thirty messuages in four declarations, *E. F. G.* and *H.*, and thirty messuages in four other declarations, &c., intending to bring four separate actions, and each declaration was entitled Doe "on the demise of *S. T.*" The landlord entered into a consent rule, comprising all the premises in all the declarations and entitled it Doe "on the several demises of *S. T.*," and the point was decided by Coleridge, J., on the ground that the rule was not entered into in any cause which had existence, inasmuch as it was entered into in a cause in which "there were *several* demises of *S. T.*" and for the recovery "of 120

(*a*) Doe d. Fleming v. Armfield, 701.

1 Dow. N. S. 327.

(*b*) Doe d. Kerr v. Roe, 7 Scott, Moore, 96.

(*c*) Doe d. Spencer v. Reid, 3

messuages," whereas there was but one demise in any of the ejectments brought by the lessor of the plaintiff, and no action brought for more than thirty messuages (*a*). It would seem that in similar cases the landlord should be guided by the number of rules moved for against the casual ejector; or by the number of tenants included in each notice to appear, in case he is desirous of appearing under the rule of Hilary Term, 1 Vict. before judgment is moved for (*b*).

The plea of the general issue, we have before observed, is to be left by the defendant with the agreement for the consent rule; and, when this is the case, as soon as the consent rule is drawn out, the issue may be made up with a copy of the rule annexed (introducing the defendant's name instead of that of the casual ejector in the declaration and issue) and an ingrossment of the issue is then to be delivered to the defendant's attorney, with notice of trial as in other actions. But if the plea be not left with the consent rule (*c*), the plaintiff must give a rule to plead, and then judgment may be entered for want of a plea as in other actions, without a special motion in Court for the purpose (*d*).

OF THE PLEA, AND ISSUE.

The general issue in this action is, not guilty (*e*); and it seldom happens, by reason of the consent rule, that the

(*a*) Doe d. Faithful *v.* Roe, 7 Dow. P. C. 718.

(*b*) Doe d. Vorley *v.* Roe, 2 Dow. P. C. 52.

(*c*) Where the plea was entitled with the true name of the cause, but by mistake in the body of the plea, the name of the lessor was inserted as the person complaining, instead of that of the plaintiff, and the lessor's attorney, looking upon

this plea as null and void, signed judgment against the casual ejector; the judgment was set aside with costs, as irregular, for the plea was properly entitled, and not a nullity; Goodtitle d. Gardiner *v.* Badtitle, Barn. 191.

(*d*) Reg. Hil. 1649, and Trin. 18 Car. II. B. R.,

(*e*) Appendix, No. 30.

defendant can plead any other plea. It is not, indeed, easy to imagine a case, in which any other plea in bar can be necessary; for as the claimant must, in the first instance, prove his right to the possession, whatever operates as a bar to that right, must cause him to fail in proving his title, and consequently entitle the defendant to a verdict upon the general issue (*a*). As, however, the consent rule was introduced for the purposes of justice, the Courts would undoubtedly permit the defendant to plead specially, if the particular circumstances of the case should require it (*b*).

A plea to the jurisdiction may be pleaded in ejectment by permission of the Court, but not otherwise. This permission is necessary, because a plea to the jurisdiction is a plea in abatement, and must therefore be pleaded within the four first days of the Term next ensuing that of which the declaration is entitled, at which time the casual ejector, and not the tenant, is defendant. To obtain leave to plead such plea, the Court must be moved upon affidavit before the expiration of the first four days of Term, the plea itself being first filed; and the motion should be for a rule to show cause why the defendant should not be permitted to plead the facts stated in the affidavit; and why the plea then filed to that effect should not be allowed. The latter part of the rule, and the filing of the plea, are necessary parts of the application, because the four days would in all probability expire before cause could be shown and the plea pleaded, unless such plea were pleaded *de bene esse* in the first instance (*c*).

(*a*) In the time of Lord Coke, (Peytoe's case, 9 Co. 77), an accord with satisfaction was held to be a good plea in ejectment, "because an ejectment is an action of trespass in its nature, and in trespass accord is a good plea;" but as this plea is quite inapplicable to the modern

uses of the action, the Court, it is conceived, would not at this time allow a defendant to plead it.

(*b*) Phillips *v.* Bury, Carth. 180.

(*c*) Williams *d.* Johnson *v.* Keen, Blk. 197; Doe *d.* Morton *v.* Roe, 10 East, 523.

Such, at least, has been the mode of proceeding in the only two reported cases upon the subject, which can be cited as authorities. But a practical difficulty occurs, for which these cases seem not to provide. At the time when the application for leave to plead to the jurisdiction is made, the tenant has not appeared, and the proceedings are against the casual ejector. By whom then should the plea be pleaded, and how is the tenant to appear? The most simple method of avoiding these difficulties, is for the tenant in the first instance to file the plea in his own name, and then move for a rule to show cause "why he should not be forthwith admitted defendant upon the usual terms, except as far as relates to pleading the general issue, and why he should not be permitted to plead the facts stated in the affidavit, upon which he moves in lieu thereof, and why the plea already filed by him to that effect, should not be allowed."

Ancient demesne is a good plea in ejectment (*a*); but it is a plea much discouraged, and the person pleading it must carefully observe every form which the Court deems necessary. As it is a plea in abatement, application for leave to plead it, must, as has already been stated, be made within the four first days of Term; and the application must be accompanied by an affidavit, that the lands are holden of a manor which is ancient demesne, that there is a Court of ancient demesne regularly holden, and that the claimant has a freehold interest; and the Court will refuse the motion, if any of these facts be omitted in the affidavit (*b*).

Ancient demesne cannot of course be pleaded where the ejectment is brought for copyhold lands (*c*); but if the affidavit state that the lands are ancient demesne, the Court will not

(*a*) Appendix, Nos. 31, 32.

T. R. 474.

(*b*) Doe d. Rust *v.* Roe, Burr.
1046; Denn d. Wroot *v.* Fenn, 8

(*c*) Brittle *v.* Dade, Salk. 185, S.
C. Ld. Raym. 43.

reject the plea upon a counter affidavit that great part of the lands are copyhold ; but will leave the plaintiff to state such matter in his reply (a).

When the party appearing has entered into the consent rule and pleaded, he may move for a rule to reply, before the plaintiff's lessor has joined in the consent rule, and *non pros.* the plaintiff; and from recent decisions it is probable that the Courts would compel the lessor of the plaintiff to pay the costs, although a contrary rule formerly prevailed in such cases (b). After issue joined the defendant also may move for judgment as in case of a nonsuit, although the lessor of the plaintiff has not joined in the consent rule (c).

The issue must agree with the declaration against the casual ejector in all respects, except in the defendant's name, unless an order for the alteration be obtained ; and if there be a difference between the issue and the declaration, the Court on motion will set it right (d). But where there was a variance between the description of the premises in the *Nisi Prius* record (upon which the plaintiff recovered), and the issue, and it did not appear how the premises were described in the declaration, the Court refused to set the verdict aside (e).

If the party interested appear and plead, and after having pleaded, withdraw his plea, the judgment must be entered against the party so appearing ; but where the costs of the suit were defrayed by the landlord in the name of his tenants

(a) Doe d. Morton v. Roe, 10 East, 523.

(b) Goodright d. Ward v. Badtitle, Blk. 763.

(c) Doe d. Williams v. Smith, 9 Dow. P. C. 1011.

(d) Bass v. Bradford, Ld. Raym. 1411.

(e) Doe d. Cotterell v. Wylde, 2 B. & A. 471 ; Jones v. Tatham, 8 Taunt. 634.

who gave a *retraxit* of the plea, and a *cognovit* of the action, the Court set aside the *retraxit* and *cognovit*, and permitted the landlord to defend the action in his own name (*a*).

The record and issue are made up with memorandums, if the proceedings are by bill; and without any memorandum, if by original, as in other actions: the time allowed for notice of trial is also the same.

A plea *puis darrein continuance* it seems may be pleaded to this action; but where the plea was that after issue joined one of the lessors of the plaintiff had released to the defendant, the Court held the plea insufficient, and said the release ought to have been by the nominal plaintiff; because although in every other respect the Court would look upon the lessor as the interested person, as far as the record was concerned they must consider the nominal plaintiff as the real party (*b*). A release by the nominal plaintiff so pleaded, would certainly, when the old practice prevailed, have been a good defence to the action; but even then the Courts held such a release to be a contempt (*c*), and it may be doubted whether a Judge would receive the plea at the present day.

When the ancient practice prevailed, if the plaintiff in ejectment after issue joined, and before the trial, entered into any part of the premises, the defendant at the assizes might plead such entry as a plea *puis darrein continuance*. But this plea cannot now be ever necessary; for the plaintiff, being a fictitious person, cannot enter upon the land; and if the lessor of the plaintiff should enter, he would be unable at the trial to prove the possession of the defendant, and must consequently fail in his ejectment (*d*).

(*a*) Doe d. Lock v. Franklin, 7 Taunt. 9.

(*c*) *Ante*, 160.

(*b*) Doe d. Byne v. Brewer, 4 M. & S. 300.

(*d*) Moore v. Hawkins, Yelv. 180.

CHAPTER IX.

Of the Evidence in the Action of Ejectment.

THE proofs by which a claimant in ejectment is required to support his claim, not only vary with the nature of his title to the premises, but are also dependent on the position in which he is placed, with respect to the defendant. When no privity has existed between the parties; that is to say, when neither the defendant, nor those under whom he holds, have been immediately or derivatively admitted into possession, either by the lessor of the plaintiff himself, or those under whom he claims, the lessor must establish a *legal* title to the premises (*a*); because, as has been already observed, it is by the strength of his own title, and not by the weakness of his adversary's, that he must prevail (*a*). But where there has been a privity between the parties, as where the relation of landlord and tenant has subsisted, or where the lessor claims as mortgagee, or where the defendant has been admitted into possession, pending a treaty for a purchase or the like (*b*), proof of title is not required; but instead thereof, the claimant should prove the circumstances under which the defendant, or those under whom he holds (*c*), were admitted into possession, and that their right to the possession had ceased: together also, when the privity is not between the immediate parties to the action, with the derivative title of the claimant from the party, by whom the defendant was originally admitted into possession (*d*). In these cases the defendant will not be permitted

(*a*) *Ante*, 28.(*b*) *Ante*, 75.(*c*) *Barwick d. Mayor of Richmond v. Thompson*, 7 T. R. 488.(*d*) *Doe d. Biddle v. Abrahams*, 1 Stark. 305; *Rennie v. Robinson*, 1 Bing. 147.

to rebut this evidence, by showing that the title of the claimant was originally defective and insufficient, for it would be contrary to good faith to permit a party to controvert the title of him, by whom he has obtained possession (*a*); but he is allowed notwithstanding to prove the nature of such title, and to show, that although originally a valid one, it expired before the commencement of the action, and that the land then belonged to another, for such a defence is not inconsistent with the terms of the original possession (*b*).

In considering this subject, we shall notice, firstly, the evidence applicable generally to actions of ejectment; and secondly, the proofs requisite in support of each particular title; subdividing this second branch into two parts, namely, the proofs requisite when no privity exists between the parties, and those required where such privity does exist; and in the latter branch, giving an epitome of those cases in which the parties originally let into possession, with the privity of the claimant or those whom he represents have, and have not been estopped from rebutting such claimant's title.

Nice questions have formerly arisen as to the competency of witnesses, having some real or imaginary interest in the event of the trial, to give evidence in this action, but these subtleties are terminated by stat. 6 & 7 Vict. c. 85, s. 1, which enacts, that no person shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence on any trial, with a special proviso that such privilege shall not extend "to any lessor of the plaintiff or tenant of the pre-

(*a*) *Sullivan v. Stradling*, 2 Wils. 208; *Driver d. Oxenden v. Lawrence*, Blk. 1259; *Parker v. Manning*, 7 T. R. 537; *Hodson v. Sharpe*, 10 East, 355; *Doe d. Pritchett v. Mitchell*, 1 B. & B. 11. 4 T. R. 682; *Doe d. Jackson v. Ramsbottom*, 3 M. & S. 516; *Doe d. Lowdon v. Watson*, 2 Star. 230; *Baker v. Mellish*, 10 Ves. jun. 544; *Gravenor v. Woodhouse*, 1 Bing. 38; *Phillips v. Pearse*, 5 B. & C. 433.

(*b*) *England d. Syburn v. Slade*,

mises sought to be recovered in ejectment;" and these parties are therefore of course, now, the only persons not competent as witnesses.

Where the ejectment is brought on several demises, and the evidence shows that the title is exclusively in one of the lessors, the other cannot be compelled to be examined as a witness for the defendant, as all the lessors are jointly liable for the costs (*a*). But a joint defendant, who has suffered judgment by default, is a good witness to prove the other defendant in possession (*b*).

The title proved must not be inconsistent with the demise in the declaration. When therefore several lessors declare upon a joint demise, proof of a joint interest in the whole premises must be given. But, if a demise is laid by each of several lessors separately, they will be entitled to recover, whether they have a joint or several interest, for a several demise severs a joint tenancy (*c*). And in a case where a joint demise was laid by seven trustees of a charity, who were appointed at different times, and the tenant had paid one entire rent to the common clerk of the trustees, it was held that such payment of rent should enure in the most beneficial way for the trustees in support of their title as brought forward by themselves, unless the defendant expressly proved them to be entitled in a different manner. And it was considered that the circumstance of their being appointed at different times was not sufficient evidence for that purpose (*d*).

The locality of the premises as described in the declaration, must be proved (*e*), but after the plaintiff has established his

(*a*) *Fenn d. Pewtress v. Granger*, East, 57.
3 Campb. 178.

(*b*) *Doe d. Harrop v. Green*, 4 East, 221.
Esp. 198; *ante*, 221.

(*c*) *Doe d. Marsack v. Read*, 12 Gunson v. Welsh, 4 Camp. 264.

(*d*) *Doe d. Clarke v. Grant*, 12

(*e*) *Ante*, 173—175; *vide* *Doe d.*

title to a verdict, the Court will not try the extent of his claim, as defined by particular metes and bounds (*a*).

Proof is not now in any case necessary of an actual entry on the premises. Since the statute for the abolition of Fines and Recoveries (*b*), and the provision in the tenth section of the statute 3 & 4 Wm. 4, c. 27, which enacts, that no person shall be deemed to have been in possession of premises, merely by making an entry thereon, the only two cases in which an actual entry was requisite, namely, where a fine with proclamations had been levied, and where the entry was necessary in order to preclude the operation of the Statute of Limitations, have ceased to exist.

It has already been observed, that the common consent rule dispenses, in all cases, with proof of entry and ouster by the defendant (*b*).

Notwithstanding the terms of the consent rule, it was formerly holden necessary to prove the defendant in possession of the premises in dispute (*c*), and plaintiffs were frequently nonsuited on subtile points arising out of this practice, quite independent of the merits of the case (*d*). But by orders of the different Courts, the consent rule is now altered, so as to include the confession of possession, as well as of lease, entry, and ouster (*e*); and no proof of possession is now required, unless there should be some dispute as to the identity of the premises, when the consent rule must be produced (*f*); but it does not satisfactorily appear from the last reported case, on which party the production rests (*g*). As however, it ought

(*a*) *Doe v. Drapers' Company v. Wilson*, 2 Stark. 477.

(*b*) 3 & 4 Wm. 4, c. 74.

(*c*) *Goodright d. Balsh v. Rich*, 7 T. R. 327; *Fenn d. Blanchard v. Wood*, 1 B. & P. 573.

(*d*) *Doe d. James v. Stanton*, 2

B. & A. 371; *Doe d. Giles v. Warwick*, 5 M. & S. 393; *Doe v. Stradling*, 2 Stark. 187.

(*e*) *Ante*, 223.

(*f*) *Ante*, 225.

(*g*) *Doe d. Greaves v. Raby*, 2 B. & Ad. 948; 1 M. & M. 237.

in all cases to be annexed to the record, it is probable that the onus of the production will be thrown upon the plaintiff.

The acts of occupiers during their occupation are, even after their occupation has ceased, evidence against the parties under whom they came into possession (*a*). And where *E.* an occupier, attorned tenant to *L.* by an instrument reciting that he was tenant, and that *L.* claimed the fee and had entered taking possession; the instrument was held to be evidence of *L.*'s ownership at the time of the attornment, against future occupiers, although such occupiers did not claim through *E.* (*b*).

The declarations of deceased occupiers are also admissible in evidence for many important purposes. Thus, a declaration by a deceased occupier, that he held the premises of *A. B.*, is *prima facie* evidence of the seisin of *A. B.* (*c*); a memorandum signed by a deceased owner of a copyhold tenement, who occupied a slip of garden adjoining, stating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is evidence to show that the garden ground formed no part of the copyhold tenement (*d*); a deed executed by a deceased party whilst in possession, charging the land with an annuity, in which he states *S.* to be the legal owner, is evidence for *S.* (*e*). Declarations of deceased occupiers are also admissible, for the purpose of proving that any particular lands formed part of the estate they occupied (*f*); and statements of deceased occupiers touching their title, are admissible in evidence generally, without reference to the particular effect they may produce in the cause (*g*).

(*a*) Doe d. Manton v. Austen, 9 Bing. 41.

(*b*) Doe d. Lindsey v. Edwards, 5 Ad. & Ell. 95.

(*c*) Peaceable d. Uncle v. Watson, 4 Taunt. 16: S. P. Doe d. Majoribanks v. Green, Gow. 227.

(*d*) Doe d. Bagalley v. Jones, 1

Camp. 367.

(*e*) Doe d. Daniel v. Coulthred, 7 Ad. & Ell. 235.

(*f*) Davies v. Pierce, 2 T. R. 53; Outram v. Morewood, 5 T. R. 121; et vide Ivat v. Finch, 1 Taunt. 141.

(*g*) Carne v. Nicoll, 1 Bing. N. C. 430.

In order to enable claimants to read in evidence the depositions given by deceased witnesses on previous trials, the parties to the two actions, and the title to the premises in dispute must be identical, but the premises themselves may be different. Thus, in a case where *A.* being seised of two closes, conveyed one to *B.*, and both *A.* and *B.* were ousted by *C.*, and both recovered possession against him, and *B.* was a second time dispossessed by *C.*, *B.* was not allowed in a second ejectment against *C.*, to prove a deposition made by a witness, since deceased, upon the trial of the former ejectment between *A.* and *C.*, and the defendant had in consequence a verdict. But upon a subsequent ejectment between the same parties, in which a count was inserted laying a demise in *A.*, the deposition was admitted in evidence under that demise, although the action was for a different property, the parties and the question in both actions being the same, viz., who was the heir at law of *E. F.* (*a*).

If a claimant in ejectment introduce what passed at a former trial respecting the same premises, to which trial neither he, nor any one claiming under him was a party, but in which the now defendant was then claimant, and obtained a verdict, for the purpose of showing such verdict to have been obtained by improper evidence—it will be competent for the defendant to give evidence of what deceased witnesses proved at the trial, for the purpose of showing that the then verdict was a correct one (*b*).

(*a*) *Doe d. Foster v. Earl of Derby*, 1 Ad. & Ell. 783. The two actions first brought by *A.* and *B.* against *C.* were tried at the same assizes. After the verdict had passed for *A.* in the action against *B.*, the counsel for *C.* submitted to a verdict in the second action, and one point raised was, whether it was agreed at the time that the evidence given in the first cause should be considered as repeated

in the second, because if so, the deposition would clearly be evidence. The Court ruled that no inference was to be drawn of such an agreement from the mere fact of the consent to the verdict, and that the party relying on such agreement must shew it either by the Judge's notes, or other distinct proof.

(*b*) *Doe d. Lloyd v. Passingham*, 2 C. & P. 440.

Assessments of commissioners of the Land Tax, by which it appears that at a certain time property was assessed in a *family surname only*, are evidence to show in connexion with other facts, that at such time the property was occupied by a particular individual of the family (*a*).

The advantages incident upon the privilege of the general reply, and also upon the right of making the first address to the jury, frequently cause admissions to be made by the defendant's counsel for the purpose of obtaining them, and this practice has given rise to some decisions upon the subject, which it will be useful here to notice.

When the lessor claims as heir and proves his pedigree and stops, and the defendant sets up a new case, which is controverted by evidence on the part of the plaintiff, the defendant is entitled to the general reply (*b*). But if the defendant's case is met by a new case on the part of the plaintiff, as for example, if the plaintiff originally claims as heir, and the defendant establishes a will, and the plaintiff sets up another will, the general reply rests with the plaintiff (*c*).

If after the pleadings are opened, the defendant's counsel expresses himself ready to admit the lessor's *whole case*, as for example, if the lessor claims as heir-at-law, and he undertakes to admit the pedigree, and that the ancestor died seised, or if he claims as devisee, and the defendant admits the will, and claims under a disputed codicil, it will entitle him to open the case, and also to the general reply, if witnesses are afterwards called on the part of the claimant (*d*). But a

(*a*) Doe d. Strode v. Leaton, 2 Ad. & Ell. 171.

(*b*) Goodtitle d. Revett v. Braham, 4 T. R. 497.

(*c*) Doe d. Goslee v. Goslee, 6 C. & P. 46.

(*d*) Doe d. Corbett v. Corbett, 3 Camp. 368; Doe d. Pill v. Wilson, 1 M. & R. 323; Fenn d. Wright v. Johnson, Nottingham Sum. Ass. 1813, MS. and S. C., Nottingham Lent Assizes, 1814.

partial admission will not be sufficient, as for example, where the real question was the legitimacy of the defendant, who was clearly heir, if legitimate, a proposition to admit that, unless the defendant was legitimate the claimant was heir-at-law was insufficient (*a*). So also, where the question was the competency of the ancestor to execute a deed of conveyance, a proposal to admit the heirship, and that the ancestor died seised, unless the same was defeated by a conveyance made by him to the defendant, was considered insufficient (*b*). But in a case where the lessor claimed as heir-at-law of *S. R.*, who was the heir-at-law of *J. C.*, and took possession of the property at the time of the death of *J. C.*, and continued in possession until his own death, and the defendant undertook to admit the seisin of *J. C.* and the heirship of the claimant, but proposed to defeat his title, by setting up a will of *J. C.*, he was permitted to begin, Lord *Denman*, C. J., observing, "Here the defendant admits all the plaintiff requires to entitle him to a verdict, except the single fact of the descent to *S. R.*, that he proposes to defeat by a will which he will have to prove, and on that will is the single issue in the cause" (*c*). And in a case where the real question in dispute was the validity of a will, and the defendant undertook to admit the heirship of the claimant, but who contended that he was not bound to accept such admission, because he claimed part of the property as assignee of an outstanding term independent of the will, it was held, notwithstanding, that the defendant was entitled to begin (*d*).

Let us now consider the proofs to be adduced by a claimant in ejectment, when his title to the lands can be controverted; that is to say, when no privity exists between the parties.

(*a*) Doe d. Warren *v.* Bray, 1 M. & M. 166.

(*b*) Doe d. Tucker *v.* Tucker, 1 M. & M. 536.

(*c*) Doe d. Wollaston *v.* Barnes, 1 M. & Rob. 386.

(*d*) Doe d. Smith *v.* Smart, 1 M. & Rob. 476.

And first, when he claims by descent, as heir of the person last seised,

When the party claims by descent, he must prove that the ancestor from whom he derives his title, was the person last seised of the lands in fee simple (*a*), and that he, the claimant, is his heir.

This seisin of the ancestor may be proved by showing, that he was either in the actual possession of the premises, at the time of his death, or in the receipt of rent from the *ter-tenant*; for possession is presumptive evidence of a seisin in fee, until the contrary be shown (*b*). But if it is probable that the defendant will rebut this presumption, the lessor should be prepared with other proofs of his ancestors' title.

In order to show the heirship of the claimant, he must prove his descent from the person last seised, when he claims as lineal heir, or the descent of himself and the person last seised from some common ancestor, or at least from two brothers or sisters (*c*), if he claims collaterally; together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties. Thus, supposing *A.* the claimant, and *B.* the person last seised, to be cousins, descended from a common ancestor *C.*, *B.* being the only child of *D.*, the elder son of *C.*, and *A.* the only child of *E.*, the younger son of *C.* In this case *A.* must prove the marriage of *C.*, the birth and marriage of *D.*, the birth, marriage, and death of *E.*, the birth and death without issue of *B.* (*d*), and his own birth (*e*); for it

(*a*) Co. Litt. 11 (*b*); Jenkins d. 1099.

Harris v. Pritchard, 2 Wils. 45.

(*b*) B. N. P. 103.

(*c*) Roe d. Thorne v. Lord, 2 Blk.

(*d*) Richards v. Richards, 15 East, 294, n.

(*e*) 2 Blk. Comm. 208, &c.

is a maxim of law, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living (*a*).

The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory modes of proving facts of this nature; and when the claimant is the lineal descendant of the person last seised, but little difficulty can arise in procuring the necessary proofs. But when he claims as collateral heir, and it is necessary to trace the relationship between him and the person last seised through many descents to a common ancestor, difficulties often intervene, from the remoteness of the period to which the inquiries must be directed, which upon the ordinary rules of evidence would be insuperable. To remedy this evil, the Courts, from the necessity of the case, have relaxed those rules in inquiries of this nature; and allow hearsay and reputation (which latter is the hearsay of those, who may be supposed to have known the fact, handed down from one to another) to be admitted as evidence in cases of pedigree (*b*).

Thus the declarations of deceased members of the family, whether relations or connexions by marriage (*c*), are admissible evidence to prove relationship; as who a person's grandfather was, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like. So likewise the declarations of deceased persons, as to the fact and time of their own marriages, and whether their children were born before or after marriage, are admissible (*d*);

(*a*) *Wilson v. Hodges*, 2 East, 312.

(*b*) *Higham v. Ridgway*, 10 East, 120.

(*c*) B. N. P. 294; *Vowels v. Young*, 13 Ves. 148; *Doe d.*

Northey v. Harvey, 1 R. & M. 297; *Doe d. Futter v. Randall*, 2 M. & P. 20.

(*d*) *Goodright d. Stevens v. Moss*, Cowp. 591; *May v. May*, B. N. P. 112.

though such declarations cannot be received to bastardise their children born in wedlock (*a*). Where likewise a cancelled will of a deceased ancestor was found amongst the papers of the person last seised, it was allowed to be read in evidence as a paper relating to the family; the place in which it was found being considered as amounting to its recognition, by the party last seised, as the declaration of his ancestor concerning the state of his family (*b*).

The reputation of a family may also afford presumptive evidence of the death of a person without issue (*c*).

But hearsay evidence is not admissible to prove the *place* of any particular birth; for that is a question of locality only, and does not fall within the principle of the rules applicable to cases of pedigree (*d*): nor are the declarations of deceased neighbours, or of the intimate acquaintances, or servants of the family, evidence on questions of this nature (*e*); nor do the declarations of an illegitimate member of a family fall within the rule (*f*); nor is the hearsay of a relative to be admitted when the relative himself can be produced (*g*). It is also necessary in order to entitle the declarations of a deceased relative to be admitted, that they should be made under circumstances, when the relation may be supposed without an interest, and without a bias; and, therefore, if they are made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one, they ought not to be

(*a*) *Rex v. Luffe*, 8 East, 193.

(*b*) *Doe d. Johnson v. Lord Pembroke*, 11 East, 505.

(*c*) *Doe d. Banning v. Griffin*, 15 East, 293; *Doe d. Oldham v. Wolley*, 8 B. & C. 22.

(*d*) *Rex v. Inhabitants of Erith*, 8 East, 542.

(*e*) *Vowels v. Young*, 13 Vez. 147, 514; *Rex v. Inhabitants of*

Eriswell, 3 T. R. 707, 723; *Weeks v. Sparke*, 1 M. & S. 688; *Johnson v. Lawson*, 2 Bing. 90; *et vide*, 14 East, 330.

(*f*) *Doe d. Bamford v. Barton*, 2 M. & R. 28.

(*g*) *Pendrell v. Pendrell*, Stran. 294; *Harrison v. Blades*, 3 Campb. 457.

received, on account of the probability that they were partially drawn from the deceased, or perhaps intended by him to serve one of the contending parties (*a*).

The presumption of the continuance of human life ends in general at the expiration of seven years, from the time when the person was last known to be living (*b*); but such death may, under particular circumstances, be presumed in a shorter time: as where a party sailed in a vessel which was never afterwards heard of (*c*). Proof also of the fact that a tenant for life has not been seen or heard of for fourteen years, by a person residing near the estate, although not a member of the family, is *prima facie* evidence of his death (*d*). There is, however, no legal presumption as to the exact time of a party's death, who has not been heard of for seven years; and if the fact of his being alive or dead at any particular period during the seven years is important, it must be proved by the party relying on it (*e*).

Reputation has been held good evidence of a marriage, in an ejectment brought by an heir, though his parents (whose marriage was the subject in dispute) were both living (*f*).

It need scarcely be stated, that in all cases where the declaration of parties, if deceased, would be admissible in evidence, the parties themselves may be called as witnesses, whilst living.

Entries in family Bibles and other books may likewise be received in evidence in questions of pedigree (*g*). So

(*a*) The case of the Berkeley Peerage, 4 Campb. 401.

(*b*) 19 Car. II. c. 6, s. 1; Doe d. George v. Jesson, 6 East, 80; Roe v. Hasland, Blk. 404.

(*c*) Watson v. King, 1 Stark. 121.

(*d*) Doe d. Lloyd v. Deakin, 4

B. & A. 433.

(*e*) Doe d. Knight v. Nepean, 5 B. & Ad. 86.

(*f*) Doe d. Fleming v. Fleming, 4 Bing. 266.

(*g*) Whitlocke v. Baker, 13 Vez.

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also recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like (a).

The original visitation books of heralds, compiled when progresses were solemnly and regularly made into every part of the kingdom to inquire into the state of families, and to register such marriages and descents as were verified to them on oath, are also allowed to be good evidence of pedigrees (b); but a recital in an act of Parliament, stating *I. S.* to be heir-at-law to a particular person, has been held not to be evidence (c).

When the lessor claims as heir to copyhold premises, he must, in addition to the foregoing evidence, produce the rolls of the manor, which show a surrender to him, or to those under whom he claims; but it is not necessary that he should prove his own admittance, unless the ejectment be against the lord (d). If, however, the ejectment is against the lord, he must either show that he is admitted, or that he has tendered himself to be admitted and been refused; but it is not necessary to tender himself to be admitted at the lord's Court, if the steward, upon application out of Court, has refused to admit him (e).

When he claims as *customary heir*, he must, after proving his pedigree, show that he is heir strictly within the custom, for every custom which departs from the common law is construed strictly; and if the custom be silent, the common law must regulate the descent (f). Thus, where the custom

(a) *Vowels v. Young*, 13 Vez. 148.

(b) 2 S. N. P. 772.

(c) *Anon.* 12 Mod. 384; *et vide* B. N. P. 112.

(d) *Rumney v. Eves*, 1 Leon. 100;

Holdfast d. Woollams v. Clapham, 1 East, 600; *Doe d. Tarrant v. Hellier*, 3 T. R. 162; *ante*, 46.

(e) *Doe d. Burrell v. Bellamy*, 2 M. & S. 87; *ante*, 46.

(f) *Co. Copy.* 43.

is that the eldest *sister* shall inherit, the eldest *aunt*, or *niece*, is not within it (*a*). So also, if the custom be that the youngest *son* shall inherit, it will not extend to the youngest *nephew* (*b*).

The usual method of proving these several customs, is by means of the different admissions of the customary heirs upon the Court rolls of the manor, produced by the steward upon oath; or by the medium of verified examined copies. But if the ancient Court rolls should be lost, or there should be no instance of an admission upon them, similar to the custom set up by the lessor, an entry upon the rolls, stating the mode of descent of lands in the manor, will be admissible evidence, as to the existence of the custom (*c*). Where, however, the lessor claimed as youngest nephew, and produced, as the only evidence to support his title, an admission upon the Court rolls of a youngest nephew, as customary heir, at a Court-leet and baron held in 1657; and for the defendant it appeared upon the same rules, that at a Court-leet and baron held in 1692, the jury and homage found, that the custom of descent extended only to the youngest son, and if no son, to the youngest brother, and no farther, (which entry was corroborated by two old witnesses, who testified, that they had heard and believed that the custom went no farther;) upon a verdict being found for the lessor of the plaintiff, the Court refused to set it aside (*d*).

Secondly, of the proofs when the lessor claims as devisee.

When the lessor claims as the devisee of a freehold interest at common law, or of a customary freehold where there is no

(*a*) *Radcliff v. Chaplin*, 4 Leon. 242. T. R. 26; *Denn d. Goodwin v. Spray*, 1 T. R. 466.

(*b*) 1 Roll. 624.

(*d*) *Doe d. Mason v. Mason*, 3

(*c*) *Roe d. Beebee v. Parker*, 5 Wils. 63.

custom to surrender to the use of the will (*a*), he must prove the seisin of his devisor (*b*); and if the devise under which he claims, be of a remainder, or a reversion in fee, or the like, he must prove the determination of all the precedent estates. He must also in case the will be dated subsequently to December 31, 1837, prove its due execution pursuant to the provisions of the statute 7 Wm. IV., and 1 Vict. c. 26, s. 9; but as that act repeals the stat. 29 Car. II. c. 3, s. 5, which previously regulated the devises of freehold interests, and makes no new provisions respecting wills of a prior date, it would seem that such wills do not require any particular solemnities to make them valid (*c*).

A considerable diversity formerly prevailed as to the solemnities required in the execution of wills, with regard to devises of freehold land, and to bequests of personalty. By the stat. 29 Car. II. c. 3, s. 5, it was required that all devises of freehold interests should be in writing, "signed by the party so devising the same, or by some other person in his presence, and by his express direction, and attested and subscribed in the presence of the devisor, by three or four credible witnesses," whilst bequests of personalty were regulated by the authority of the Ecclesiastical Courts upon looser and widely different maxims. By the tenth section of the stat. 7 Wm. IV., and 1 Vict. c. 26, (repealing the 29 Car. II. c. 3, s. 5), it is enacted, that *no will* (with the exception of soldiers' or mariners' wills) made after the 31st day of December, 1837, "shall be valid, unless it shall be in writing, and executed in manner hereinafter mentioned, that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest

(*a*) *Hussey v. Grills*, Amb. 299.

(*b*) *Ante*, 239.

(*c*) *Doe d. Smith v. Smith*, Peake, Evid. 456.

and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

There is, therefore, now no difference in the solemnities requisite for the validity of wills as regards the nature of the property disposed of by them. But the same diversity exists as heretofore in the mode of proof, according to the nature of the property in dispute. The Ecclesiastical Courts have no jurisdiction over wills with regard to freehold interests; and, whenever a freehold is claimed, the original will must be produced, or proof given of its loss, and secondary evidence given of its contents as in the case of other documents, by examined copies, or parol testimony. And such is the jealousy of the common law with regard to ecclesiastical jurisdiction, that neither an exemplification under the great seal (*a*), nor the probate under the seal of the Ecclesiastical Court (*b*), will be admitted as secondary evidence; though it seems that the register-book, or ledger-book, in which the will is set out at length, is in such case admissible; whilst on the contrary when a chattel interest is in dispute, the common and ordinary proof is the production of the probate, or if that should be lost the exemplification (*c*).

The reported cases upon different points which have arisen respecting the due execution of a will under stat. 29 Car. II. c. 3, s. 5, are very numerous, and it will be necessary to review them carefully, for the purpose of ascertaining what portion of them are applicable to the provisions of the statute which has superseded it.

The difference between the statutory enactments are as follows. Firstly, the statute 29 Car. II. only required that the

(*a*) Comber, 40.

Ormerod, 2 M. & R. 466.

(*b*) Doe d. Ash v. Calvert, 2
Camp. 389; *et vide* Doe d. Wild v.

(*c*) St. Leger v. Adams, 1 Ld.
Raym. 731; Anon. Skin. 174.

will should be signed by the party or some other person in his presence and by his authority: the statute 7 Wm. IV. and 1 Vict. furthermore provides, that such signing "shall be at the foot or end thereof." This proviso puts an end to the distinctions which have arisen as to implied signatures, and the places and number of signatures (*a*); and it would seem also to have settled in the negative the question of the effect of sealing only (*b*). Secondly, it is now necessary that the signature should be made or acknowledged by the testator in the presence of the witnesses. Neither of these circumstances were formerly requisite. No acknowledgment of the signature was necessary, and it was sufficient if the testator acknowledged in the presence of any one of the witnesses that the instrument was his will (*c*). Thirdly, the witnesses must now all be present when the will is signed, or the signature acknowledged by the testator, whereas formerly an acknowledgment in the presence of one witness only either of the signature or the nature of the instrument, provided the other witnesses signed the paper, although at other times, at the testator's request, was sufficient (*d*). Fourthly, two witnesses only are now required instead of three. And, fifthly, although it is re-enacted, that the witnesses "shall attest and subscribe the will in the presence of the testator," it is also expressly enacted, "that no form of attestation shall be necessary," which removes the doubts that have existed as to imperfect attestations.

(*a*) *Lemyane v. Stanley*, 3 Lev. 1; *Right d. Cator v. Price*, Doug. 241.

(*b*) *Lemayne v. Stanley*, 3 Lev. 1; *Lee v. Libb*, 1 Show. 69; S. C. Carth. 35; *Warneford v. Warneford*, Stran. 764; *Smith v. Evans*, 1 Wils. 313; *Ellis v. Smith*, 1 Ves. jun. 11; S. C. 1 Dick. 225; *Baker v. Denning*, 8 Ad. & Ell. 94.

(*c*) *Grayson v. Atkinson*, 2 Ves. 454; *Ellis v. Smith*, 1 Ves. jun. 11; S. C. 1 Dick. 225; *Trymner v. Jackson*, cited 1 Ves. 487, recog. 2 Ves. 258; *Stonehouse v. Evelyn*, 3 P. Wms. 252; *Peate v. Ougly*, Comyn. 197.

(*d*) *White v. Trustees of British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457.

These positive enactments have removed many of the inconveniences resulting from the loose wording of the statute 29 Car. II. c. 3, s. 5; but the rules which relate to the subscription by the witnesses are still applicable.

It was not formerly necessary that the witnesses should subscribe at the same time; nor be informed of the nature of the instrument they were about to attest (*a*), nor are either of these incidents now necessary. The witnesses must be all present when the testator signs the will himself or acknowledges the signature, and the witnesses must also all sign in the testator's presence; but the statute does not require that the witnesses should sign at the same time, or in the presence of each other. But it is necessary that all the witnesses attest the *same instrument*, and that the instrument attested be that by which the lands are intended to pass. Therefore, where a testator devised his lands by a will, attested by two witnesses only, and about a year after made a codicil, and declared therein that the will should be ratified and confirmed in all things, except as altered by that writing, and that his codicil should be taken as part of his will; and executed this codicil in the presence of one of the former witnesses, and another person, neither the first will, nor the other witness to it, being present, it was holden to be an insufficient attestation (*b*). And where a testator, by a will *not witnessed*, devised lands, and afterwards made a codicil, and taking the codicil in one hand, and the will in the other, said, "This is my will whereby I have settled my estate, and I publish this codicil as part thereof," the signature of the codicil, by the testator and three witnesses, was held insufficient to render

(*a*) *White v. Trustees of British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Keigwin v. Keigwin*, 3 Curt. 607, 610, *et vide*

Warren v. Postlethwaite, 2 Collyer, 113, *in notis*.

(*b*) *Lee v. Libb*, 3 Lev. 1; S. C. Carth. 35.

the will valid (*a*). But if there be several instruments written by the testator upon one paper, and it plainly appear that his intention was that all should form but one will, and not a will and codicil, in such case the execution of the last instrument will be considered as an execution of the whole (*b*). So also if a will be written upon several sheets of paper, it will be valid, although the last sheet only be seen by the witnesses, provided it be regularly signed and attested, and every part of the will be present at the time of the execution; of which latter fact the presumption of law will be in favour, should the different sheets correspond (*c*).

The subscription of the witnesses must still also be in the presence of the testator, but proof need not now more than formerly be given that the testator *actually did see* the witnesses subscribing: their attestation is sufficient if it appear that he *might see them* (*d*). Thus, where the witnesses signed in a room adjoining to the one which contained the testator's bed, upon a table opposite to the door of communication, it was holden to be sufficiently in the testator's presence (*e*). So also, where the testator executed his will in his carriage, and the witnesses signed their names in a room hard by, the carriage being in such a situation, as to enable the testator to see what was passing in the room, the will was held to be valid (*f*). But if the testator could not possibly see the witnesses subscribe, as if they subscribe in another room, out of sight, although by the testator's express directions, the

(*a*) *Penphrase v. Ld. Lansdowne*, cited Com. 334; *Attorney General v. Barnes*, Prec. Cha. 270.

(*b*) *Carleton d. Griffin v. Griffin*, Burr. 549; *Doe d. Williams v. Evans*, 1 C. & M. 12.

(*c*) *Bond v. Seawell*, Burr. 1773; S. C. Blk. 407; B. N. P. 264.

(*d*) *Baker v. Denning*, 9 Ad. &

El. 95; *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, ib. 504.

(*e*) *Shires v. Glasscock*, Salk. 688; *Davy v. Smith*, 3 Salk. 395; *Todd v. Earl of Winchelsea*, 1 M. & M. 12.

(*f*) *Casson v. Dade*, 1 Bro. C. C. 99.

execution will not be good: the design of the statute being to prevent a wrong paper from being intruded on the testator, in the place of the true one (*a*). And upon this principle, if the testator, between the time of his own subscription, and the subscription of the witnesses, lose his mental powers, it will invalidate the will, although signed in his presence (*b*).

A mark is a sufficient signature to a will within the meaning of the statute, and an attestation by a mark has also been adjudged to be a sufficient attestation; and it has been decided in the former case, that it is not necessary to prove that the party could not sign his name (*c*).

Inconveniences have frequently arisen, and wills been rendered inoperative from the incompetency of one or more of the subscribing witnesses, and a provision for remedying these evils, although in some respects an imperfect one, was provided by statute 25 Geo. II. c. 6 (*d*); but that statute was repealed by 7 Wm. IV. and 1 Vict. c. 26, and it is by the 14th section of the latter statute, provided, "That if any person who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid." The effect of gifts by the will to an attesting witness is also provided for by the 15th section.

The result of the foregoing inquiry seems to be, that in order to prove a will duly executed within the statute

(*a*) *Eccleston v. Petty*, Carth. 79; *Broderick v. Broderick*, 1 P. Wms. 239; *Machel v. Temple*, 2 Show. 288; *Doe d. Wright v. Manifold*, 1 M. & S. 294.

(*b*) *Right d. Cator v. Price*, Doug. 241.

(*c*) *Todd d. Lord Winchelsea*, 1 M. & M. 13; *Longford v. Eyre*, 1 P. Wms. 740.

(*d*) *Bettison v. Bromley*, 12 East, 250; *Hatfield v. Thorpe*, 5 B. & A. 589.

7 Wm. IV. and 1 Vict. c. 26, it must be signed by the testator himself, or by his express direction, at the foot or end thereof; that such signature must be made or acknowledged by him before two or more witnesses, then present together; that such witnesses must subscribe their names respectively in the presence of the testator, and that all the witnesses must sign the same instrument.

These facts must be proved by the subscribing witnesses, if they are alive and can be produced. But if one witness can prove the whole execution, this will be sufficient proof of the will, without calling the others (*a*); and if there be two trials, and between them the witness who proved the execution of the will at the first trial should die, and there should be an order of Court that the evidence of any witness upon the first trial, who should be dead at the time of the second, shall be read in evidence from the Judge's notes, the deposition of such dead witness will be sufficient evidence of the due execution of the will at the second trial, although it should be proved that another subscribing witness was present in Court (*b*). If, however, the witness who is called can only prove his own share of the transaction, the other witnesses must be called. If also the will is disputed by the heir-at-law, he is always entitled to the testimony of all the subscribing witnesses; but then he must produce them himself, if the testimony of one is sufficient for the devisee.

If all the witnesses are dead, insane, or out of the jurisdiction of the Court, proof of the handwriting of the deviser and witnesses, or of the deviser alone, if no proof of the hand-

(*a*) The rule is different in equity; and when a bill is filed in Chancery to establish a will, all the witnesses must be examined by the plaintiff; *Hindson v. Kersey*, 4 Burn. Ec. Law, 93; *Ogle v. Cook*, 1 Vez. 177; *Townsend v. Ives*, 1 Wils. 216.

(*b*) *Wright v. Doe d. Tatham*, 1 Ad. & Ell. 3.

writing of the witnesses can be obtained, will be sufficient without evidence of the solemnities (*a*).

If a subscribing witness should deny the execution of the will, he may be contradicted as to that fact by another subscribing witness (*b*); and even if they all swear, that the will was not duly executed, the devisee will be allowed to go into circumstantial evidence to prove its due execution (*c*). So also if one of the subscribing witnesses impeach the validity of the will on the ground of fraud, and accuse other witnesses who are dead, of being accomplices in the fraud, the devisee may give evidence of their general character (*d*).

When an ejectment is brought by the devisee of a copyholder, he must prove his own admission, and the admission of his testator (*e*); and these facts will be sufficiently established, by producing the original entries on the rolls of the manor by the proper officer (which entries the Courts will compel the lord to permit his tenant to inspect) (*f*), and proving the identity of the parties admitted (*g*), without also producing the stamped copies required by the statute 55 Geo. III. c. 184 (*h*). The will of the devisor must likewise be proved in the same manner as if the devise were of a freehold interest.

The statute 55 Geo. III. c. 192, which dispenses with the necessity of the surrender of copyholds to the use of the will of the copyholder, has been held to extend to those cases only,

(*a*) *Hands v. James*, Com. 531; *Croft v. Pawlett*, Stran. 1109.

(*b*) *Vide Alexander v. Gibson*, 2 Campb. 556.

(*c*) *Lowe v. Jolliffe*, Blk. 365; *Pike v. Badmering*, cited Stran. 1096; *Gilb. Evid.* 69; *B. N. P.* 264.

(*d*) *Doe d. Walker v. Stephenson*, 3 Esp. 284; *S. C.* 4 Esp. 50.

(*e*) *Roe d. Jefferey v. Hicks*, 2 Wils. 13; *Doe d. Vernon v. Vernon*, 7 East, 8; *ante*, 47.

(*f*) *Folkard v. Hemet*, Blk. 1061; *The King v. Shelly*, 3 T. R. 141.

(*g*) *Doe d. Hanson v. Smith*, 1 Campb. 197.

(*h*) *Doe d. Bennington v. Hall*, 16 East, 208.

where the surrender is merely formal; and therefore, where by the custom of a manor, a *feme covert* was allowed by will to pass her copyholds, the same having been previously surrendered by the husband and wife (the wife being examined separate and apart), and the wife subsequently to the statute made her will, but without making a previous surrender, the copyholds did not pass; the surrender being matter of substance, and requiring to be accompanied by the separate examination of the wife (*a*).

It is not necessary in case the testator should be a marksman or blind, that the will should be read over to him previous to its execution (*b*).

Declarations of a testator are admissible, where a will is disputed on account of fraud, circumvention, or forgery (*c*), and evidence may also be given of declarations made by him, that he had attempted to destroy his will (*d*).

If a will be more than thirty years old it proves itself; and the age of the will is to be reckoned from the day it bears date, and not from the time of the testator's death (*e*). And it is no objection that possession has not followed the will, because the Court cannot know how the will directs the possession to go, until it is read (*f*).

A witness is not bound to produce in obedience to a subpoena, a will which he holds as attorney for a devisee claiming

(*a*) Doe d. Nethercote v. Bartle, 5 B. & A. 492.

(*b*) Longchamp d. Goodfellow v. Fish, 2 N. R. 415.

(*c*) Doe d. Ellis v. Hardy, 1 M. & R. 525.

(*d*) Doe d. Reed v. Hawes, 7 C. & P. 331.

(*e*) Doe d. Oldham v. Wolley, 8 B. & C. 22; Lord Rancliffe v. Parsons, 6 Dow. 202; M'Kenire v. Fraser 9 Vez. 5, *et vide n.* † to the case of Gough d. Calthorpe v. Gough, 4 T. R. 706, *in notis*.

(*f*) Doe d. Lloyd v. Passingham, 2 C. & P. 440.

under it; although it is suggested that it is a will of personalty, and ought therefore to be deposited in the Ecclesiastical Court (a).

If the lessor be the legatee of a term for years, he must give in evidence the probate of the will, and prove the assent of the executor to the bequest; for where a person bequeaths either specifically, or generally, goods or chattels, real or personal, and dies, the legatee cannot take them without the assent of the executors (b). He must also prove the title of his testator, and show that he had a chattel and not a freehold interest in the premises; because when a party dies in possession, the presumption is that he is seised in fee. This is most commonly done by the production of the lease: but in a late case, where the lessor put in an answer of the defendant to a bill in equity, in which the defendant stated, that "he believed the lessor was *possessed* of the *leasehold* premises in the bill mentioned," it was held, as against the defendant, sufficient evidence that the interest of the testator was only a chattel interest (c).

Thirdly, of the evidence necessary when a party claims the land under an execution.

When an ejectment is brought by a tenant by *elegit* (d), and the debtor is himself in possession of the land, the only evidence necessary is an examined copy of the judgment roll, containing the award of the *elegit*, and return of the inquisition. But if the possession is in a third person, the lessor must either show that such third person came into possession under the debtor, and that his right to the possession has ceased; or (should the party in possession hold adversely

(a) Doe d. Carter v. James, 2 M. & R. 47.

(b) 1 Inst. 111 (a); ante, 52.

(c) Doe d. Digby v. Steel, 3 Campb. 115.

(d) Ante, 69, 109.

to the debtor) be prepared with evidence of his debtor's title (*a*).

When the debtor and his tenants are made defendants jointly, after proof of a *prima facie* title to the whole premises in the debtor, it is incumbent on the other parties to show their better title, as for example, by tenancy anterior to the judgment or the like, or the *elegit* creditor must recover (*b*). It is not necessary in any case to prove a copy of the *elegit* and inquisition (*c*).

The conusee of a statute merchant, when the debtor is in possession, must prove a copy of the statute, of the *capias si laicus*, and extent and *liberate* returned; for although by the return of the extent an interest is vested in the conusee, yet the actual possession of that interest is acquired by the *liberate* (*d*).

The same proofs are also necessary, when a third person is in possession, as in the case of a tenant by *elegit* (*e*).

When the ejectment is to recover lands taken in execution, under a writ of *feri facias*, on a judgment obtained against a termor, if the party in the original action, in which the execution issues, is the claimant, the judgment must be proved (*f*). But the writ alone is a sufficient title to the vendee of the sheriff (*g*). And where an assignment of a lease by deed taken in execution, was made by the under-sheriff in the name, and under the seal of office of the sheriff, it was held unnecessary to prove his authority (*h*).

(*a*) Doe d. Da Costa v. Wharton, 8 T. R. 2.

(*b*) Doe d. Evans v. Owen and Others, 2 Tyr. 149.

(*c*) Ramsbottom v. Brickhurst, 2 M. & S. 565.

(*d*) Hammond v. Wood, 2 Salk. 563.

(*e*) Ante, 301.

(*f*) Doe d. Bland v. Smith, 2 Star. 199; S. C. Holt, 589.

(*g*) Doe d. Batten v. Murless, 6 M. & S. 113; *et vide* Doe d. Emmet v. Thorn, 1 M. & S. 425.

(*h*) Doe d. James v. Brown, 5 B. & A. 243.

Fourthly, of the proofs to be given, when the claimant is a parson.

When a parson brings ejectment for the parsonage-house, glebe, or tithes, he must prove his admission, institution, and induction (*a*); but he need not show a title in his patron, for institution and induction, although upon the presentation of a stranger, are sufficient to put the rightful patron to his *quare impedit* (*b*).

Presentation may be by parol, or by writing in the nature of a letter to the bishop (*c*); in the latter case it may be proved by production of the letter; in the former by a witness who was present and heard it; but it cannot be proved by the person making the presentation, although he were only grantee of the avoidance (*d*). The ceremony of institution may be proved by the letters testimonial of institution; or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation it was given. This entry, therefore, if regularly made, is proof of the presentation, as well as of the institution. The induction may be proved, either by some person present at the ceremony, or by the indorsement on the mandate of the ordinary to induct, or by the return of the mandate, if any has been made (*e*).

Proof was formerly required that the claimant had read and subscribed the thirty-nine articles, according to the statute, and declared his assent and consent to all things contained in the book of Common Prayer; but this is no longer held to be necessary, unless some ground be laid by the defendant to

(*a*) Snow d. Crawley v. Phillips, 723.

1 Sid. 220.

(*b*) B. N. P. 105.

(*c*) Co. Litt. 120, (*a*); B. N. P. 942.

105; The King v. Eriswell, 3 T. R.

(*d*) B. N. P. 105.

(*e*) Chapman v. Beard. 3 Ans.

show, that he has not complied with these requisites ; because the presumption is, that every man has conformed to the law, until there be some evidence to the contrary (*a*).

Entries made by a deceased rector in his books, may be given in evidence by his successor (*b*), upon a question of tithes ; and he is also entitled to give in evidence such terriers as have been regularly made and preserved in the proper repository ; that is to say, such terriers as are signed by a churchwarden, or (if the churchwardens are nominated by the parson) by some of the substantial inhabitants of the parish (*c*), and are found either in the bishop's register office (*d*), or in the register of the archdeacon of the diocese (*e*). It is not necessary that the terrier should be signed by the parson ; but, unless it possesses the marks of authenticity above mentioned, it cannot in general be received in evidence. But where a terrier was found in the registry of the dean and chapter of Lichfield, it was admitted in evidence against one of the prebendaries, upon the principle that there appeared to be a proper connexion between the terrier, and the place where it was found (*f*). The declarations of a former incumbent are evidence against his successor (*g*).

An ejectment for a parsonage and glebe, will not be supported, by showing that the defendant entered and took the tithes belonging thereto ; because the tithes and the rectory are not the same (*h*).

When a lay impropriator brings an ejectment for tithes, the

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| (<i>a</i>) <i>Powell v. Milburn</i> , 3 Wils. 1406. | (<i>e</i>) <i>Potts v. Durant</i> , 4 Gwill. 1050, 1054. |
| 355 ; S. C. 2 Black. 851. | (<i>f</i>) <i>Miller v. Foster</i> 4 Gwill. 1406. |
| (<i>b</i>) <i>Glynn v. Bank of England</i> , 2 Vez. 38, 43 ; <i>Roe d. Brune v. Rawlings</i> , 7 East, 279, 290. | (<i>g</i>) <i>Doe d. Coyle v. Cole</i> , 6 C. & P. 359. |
| (<i>c</i>) B. N. P. 248 ; <i>Earl v. Lewis</i> , 4 Esp. 3. | (<i>h</i>) <i>Hem v. Stroud, Latch</i> , 61. |
| (<i>d</i>) <i>Atkins v. Hatton</i> , 4 Gwill. | |

strict proof of title is to show that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims (*a*); but, as deeds and instruments are liable to be lost, length of possession, and old deeds conveying tithes, have been deemed sufficient evidence of title (*b*).

Fifthly, of the proofs required, when the action is brought by a guardian, for the lands of an infant.

If the claimant be a guardian in socage (*c*), he must prove the seisin of the person from whom his ward claims (*d*); the heirship of the ward; that he was under the age of fourteen years at the time of the demise in the declaration; and that amongst those relations to whom the inheritance cannot descend, he himself is the next of blood to the ward (*e*).

If the claimant be a testamentary guardian appointed by statute 12 Car. II. c. 24, s. 8, he must prove the seisin of the father; the due execution of the deed or will, which appoints him guardian; and the minority of the ward at the time of the demise.

Sixthly, of the proofs required by churchwardens and overseers under statute 59 Geo. III. c. 12, s. 17.

If the holding be adverse to the claimants, the title to the premises, as well as the appointments of the lessors as churchwardens and overseers, must be regularly proved; but if the premises have been used as parish houses, proof that the parish officers have from time to time placed the parish poor in them,

(*a*) *Vide* Com. 651.

(*b*) *Kinaston v. Clarke*, 5 T. R. 265, *in notis*.

(*c*) *Ante*, 49.

(*d*) *Ante*, 28.

(*e*) *Litt. Sec.* 123; *Doe d. Rigge v. Bell*, 5 T. R. 471.

together with the appointments of the lessors to their respective offices, will be sufficient. It will not be necessary in such cases to prove any notice to quit or demand of possession; and if the paupers so placed in the premises, shall have given up their possession to some third person, who claims them as his own, he cannot set up that claim in answer to an ejectment brought by the parish officers (*a*).

Seventhly, of the proofs required by persons claiming in a representative character, that is to say, by assignees of bankrupts, or insolvent debtors (*b*), and by executors and administrators.

The production of the proceedings properly authenticated, is the only species of proof now required in the two former cases, beyond the proof of the title of the bankrupt or insolvent (*c*).

When an ejectment is brought by a personal representative, he must show his representative character by producing the probate of the will, or letters of administration, or the book of the Ecclesiastical Court, wherein they are entered (*d*), in addition to the proof of his testator's, or intestate's, title. But minutes of the proof of the will and sealing of the probate, indorsed on the will by the surrogate and registrar of the Ecclesiastical Court, will be sufficient, upon proof that by the prac-

(*a*) *Doe d. Haden v. Burton*, 9 C. & P. 254.

(*b*) *Vide Com.* 651.

(*c*) A lessor whose property has been assigned to a provisional assignee, under the Insolvent Debtors' Act, cannot eject an occupier of land, which passed under the assignment, although the provisional assignee

has never taken possession, nor any permanent assignee been appointed, nor the rent ever withheld from the lessor. (*Best, C. J., dis.*) *Doe d. Palmer v. Andrews*, 4 Bing. 348.

(*d*) *Garret v. Lister*, 1 Lev. 25; *Elden v. Keddell*, 8 East, 187; *Cont. B. N. P.* 108.

tice of the particular Court, no other record of such grant is kept (a).

Eighthly, of the proofs by a lord of the manor, and by copyholders.

When a lord seises the land as forfeited *pro defectu tenentis*, if he seise absolutely, he must prove a custom in the manor entitling him to do so; but if he seise only *quousque*, the custom need not be proved; and an absolute seisure unwarranted by the custom, cannot afterwards be set up as a seisure *quousque* (b). He must also prove that the regular proclamations have been made, and in one report of Lord Salisbury's case (b), it is said, that the proclamations must be proved by *viva voce* evidence, and that the entry thereof on the court rolls is not sufficient; but no mention is made of this point in the other report of the same case, nor does it appear in a modern similar decision, that any evidence of this nature was required (c).

When the lord of a manor brings an ejectment for a forfeiture, he must prove that he was lord at the time of the forfeiture committed (unless the act of forfeiture destroys the estate, in which case, the heir of such lord may also take advantage of it) (d), and that the person, who is alleged to have committed the forfeiture, has been admitted tenant on the rolls of the manor. Proof of the admittance of the father, and of the descent to the copyholder as son and heir, and payment of quit-rents by him, will not be sufficient evidence: the tenant must be himself admitted, for nothing vests in a copyholder which he can forfeit, before admittance and entry. The act of forfeiture must of course also be proved; but proof is

(a) Doe d. Bassett v. Edwards, 7 Ad. & Ell. 240.

(b) Lord Salisbury's case, 1 Lev. 63; S. C. 1 Keb. 287.

(c) Doe d. Tarrant v. Hellier, 3 T. R. 162.

(d) Ante, 44.

not required of the presentment of the forfeiture, nor of the entry, or seisure of the lord (*a*); nor will the defendant be allowed, having been admitted and done fealty, to show that the *legal* estate was not in the lord at the time of admittance (*b*).

Upon a question whether a slip of land between some old enclosures and the highway, vested in the lord of the manor or the owner of the adjoining freehold, evidence was received of acts of ownership by the lord on similar slips of land not adjoining his own freehold, in various parts of the manor (*c*).

Proof of the party under whom the lessor claims having held a Court many years ago, and of the lessor himself having held Courts and also appointed gamekeepers, is *primâ facie* evidence that a manor exists, and that the claimant is the lord, without the production of court rolls or any documentary evidence of Courts having been held (*d*).

The legality of the title of the lord or steward who admits a copyholder is immaterial, provided the admission is in pursuance of a surrender, and not a voluntary grant from the lord (*e*); and a record in the record book of the manor, of admittance to a copyhold, reciting a surrender of the same copyhold to the use of a will, is admissible evidence of the surrender, the steward not being able to find the surrender itself on the roll or elsewhere, and the surrender being irregularly kept in the manor, although all the other surrenders were either preserved or recorded on the roll (*f*).

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| (<i>a</i>) <i>Roe d. Jeffreys v. Hicks</i> , 2 Wils. 13; <i>Doe d. Foley v. Wilson</i> , 11 East, 56; B. N. P. 108; <i>et vide</i> Watk. Copy. v. i. 324 to 353. | Bing. 332. |
| (<i>b</i>) <i>Doe d. Nepean v. Budden</i> , 5 B. & A. 626. | (<i>d</i>) <i>Doe d. Beck v. Heakin</i> , 6 Ad. & Ell. 495. |
| (<i>c</i>) <i>Doe d. Barrett v. Kemp</i> , 7 | (<i>e</i>) <i>Doe d. Burgess v. Thompson</i> , 1 Nev. & P. 215. |
| | (<i>f</i>) <i>Rex v. Inhabitants of Thruscross</i> , 1 Ad. & Ell. 126. |

The court rolls, containing a presentment of an admittance upon a surrender out of Court, are *prima facie* evidence of the surrender as between surrenderor and surrenderee, without producing the original surrender, or inquiring into the sufficiency of the stamp upon it (*a*).

A copyholder who has been admitted to a tenement, and done fealty to the lord of the manor, is estopped in an action by the latter for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance (*b*).

A lord of a manor cannot maintain ejectment for mines upon his manor, without proof that he has been actually possessed of them within the last twenty years; because they are a distinct possession from the manor, and may be of different inheritances (*c*). And a verdict in trover, for lead dug out of them, will not be evidence of the possession of the mines, for trover may be brought on property without possession (*d*).

The doctrine of presumption extends to copyhold lands, and upon proper evidence an enfranchisement of them may be presumed even against the crown (*e*).

When an ejectment is brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance; but it is immaterial whether the admittance be before or after the day of the demise in the declaration (*f*).

But where the lessor claims as heir, or under a grant of a

(*a*) Doe d. Garrod v. Olley, 12 Ad. & Ell. 481.

(*b*) Doe d. Nepean v. Budden, 1 D. & R. 243; 6 B. & Ad. 626.

(*c*) Rich v. Johnson, Stran. 1142.

(*d*) R. N. P. 102.

(*e*) Roe d. Johnson v. Ireland, 11 East, 220.

(*f*) Ante, 46.

reversion by the lord expectant on a life estate, proof of admittance is unnecessary (*a*).

When a copyholder was convicted of a capital felony but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seising the copyhold, it was held that at the expiration of the two years the copyholder might maintain ejectment for the land against one who had ousted him, inasmuch as the pardon had restored his competency, and the estate would not vest in the lord without any act done by him (*b*).

We must now consider the proofs required when a privity exists between the defendant and the lessor of the plaintiff, or those from whom he derives title; and herein of the cases relative to the estoppel of parties in such cases from controverting the claimant's title.

Privities of this description principally happen in three different cases. Firstly, when the relation of mortgagor and mortgagee exists between the parties; secondly, when that of landlord and tenant has existed; and, thirdly, when the defendant has been admitted into possession under a void lease, or pending a treaty for a purchase, or under circumstances of a like character (*c*).

Firstly, Of the proofs by mortgagees.

When the lessor of the plaintiff is the mortgagee of the premises, and the mortgagor is himself the defendant, proof of the due execution of the mortgage deeds is the only evidence required (*d*). Proof of a notice to quit or demand possession is not necessary (*e*). But if the ejectment be against a third

(*a*) *Ante*, 46; *Roe d. Cosh v. Loveless*, 2 B. & A. 453.

(*b*) *Doe d. Evans v. Evans*, 5 B. & C. 584.

(*c*) *Ante*, 75.

(*d*) *Ante*, 77.

(*e*) *Doe d. Fisher v. Giles*, 5 Bing. 241; *Doe d. Robey v. Maisey*, 2 B. & C. 767.

person, who holds the mortgaged lands as tenant to the mortgagor, it will be also necessary to give evidence of such tenancy, and either of its regular determination, or that it was created by the mortgagor subsequently to the execution of the mortgage deed (a).

The proofs are the same when the assignee of a mortgagee is the claimant, with the additional proof of the derivative title of the assignee from the mortgagee.

The mere fact of a mortgagee having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him, that the mortgagor or his tenant was in lawful possession of the premises until the time when such interest was paid, and consequently is no defence to an ejectment brought by the mortgagee (b).

In an ejectment by a mortgagee against the assignee (under the Insolvent Act) of the mortgagor, it has been ruled, that a letter from the mortgagor to the mortgagee, dated previously to the assignment, is evidence against the defendant, and will be presumed to have been written at the time of its date, until the contrary is shown (c).

Proof of the title of the mortgagee must of course be given, if the defendant hold adversely to such title; but if it appear upon the evidence that the defendant, although not the mortgagor, is in reality defending for his benefit, he will be subject to the same rules with regard to proofs, and be estopped in the same manner from disputing the mortgagee's title as the mortgagor himself (d).

(a) *Keech v. Hall*, Doug. 21; *Thunder d. Weaver v. Belcher*, 3 East, 449; *Birch v. Wright*, 1 T. R. 378; *Doe d. Clark v. Trappaud*, 1 Stark. 281.

(b) *Doe d. Rogers v. Cadwal-*

lader, 2 B. & Ad. 473.

(c) *Goodtitle d. Baker v. Milburn*, 2 M. & S. 853.

(d) *Doe d. Hurst v. Clifton*, 4 Ad. & Ell. 813.

The following decisions with respect to the rights of mortgagors, or those claiming under them to dispute the title of the mortgagee, have been reported.

Where the mortgage was by lease and release, and the release recited that the releasor was legally or *equitably entitled* to the premises conveyed, and he covenanted that he was lawfully or *equitably* seised in his demesne of and in the premises, and otherwise well entitled to the same, and the legal estate was subsequently conveyed to him; and he afterwards for a valuable consideration conveyed the same to a third party: upon ejectment brought by the mortgagee against such third party, it was held that there being in the release no certain or precise averment of any seisin in the releasor, but only a recital or covenant that he was legally or *equitably* entitled, the defendant was not estopped from setting up the legal estate acquired by him after the execution of the release. It was also held that the release did not operate as an estoppel by virtue of the words, "granted, bargained, sold, aliened, remised, released, &c., because the release passed nothing but what the releasor had at the time, and he had not the legal title in the premises at the time of the release. It was also held that the case did not fall within the rule, that a mortgagor cannot dispute the title of his mortgagee, because the party claimed as a purchaser for a valuable consideration without notice, a legal interest which was not in the mortgagor at the time of the mortgage, he having at that time an equitable interest only, to which his title was not disputed (*a*).

M. being seised in fee mortgaged to *O.*, but remained in possession, and afterwards demised part to *B.* who also entered, after which *M.* mortgaged to *H.* *H.* after this received rent from *B.*, and demised the other part to *A.*—afterwards *B.* and *A.* on notice from *O.*, paid *O.* rent, *H.* then brought eject-

(*a*) Right d. *Jeffreys v. Bucknell*, 2 B. & Ad. 278.

ment (after notice to quit) against *B.* and *A.* It was held that *B.* and *A.* might both show in defence, the first mortgage to *O.*, *O.*'s notice to them, and their payment of rent to *O.*; for that, although *B.* could not dispute *M.*'s title at the time of the demise, he might show that *H.* had no derivative title, and he was not precluded by having paid rent to *H.* under a mistake of the facts. Also, that *A.* by showing that *M.* at the time of the demise to him, was only mortgagor in possession, did not impugn *M.*'s right to confer upon him by the demise, a legal title to the possession, but might show that *M.* had since been treated as a trespasser by the mortgagee, so as to determine *M.*'s right; and that *O.*'s notice to the tenant to pay him the rent might, if received in evidence, tend to show that by so doing, *O.* treated the mortgagor as a trespasser (*a*).

Where a canon demised by way of mortgage, "all the canonry of him the said *A. B.*, and all the lands, messuages, &c., thereunto belonging," he was not estopped by the mortgage deed from showing that the house in respect of which the ejectment was brought, and which had been assigned to him on his installation as canon, and of which he still retained possession, did not belong to the canonry (*b*).

Where *V.* having a defective title mortgaged land in fee to *O.*, and continued in possession, and afterwards a lease was granted to him by the real owner in pursuance of an award; it was held that *V.* could not set up such lease as an answer to an ejectment brought by *O.* (*c*).

Secondly, of the proofs by landlords against tenants.

When the relation of landlord and tenant subsists between

(*a*) *Doe d. Higginbotham v. Barton*, 11 Ad. & Ell. 307. 1 M. & G. 625.
 (*b*) *Doe d. Butcher v. Musgrave*, & Ell. 782.
 (*c*) *Doe d. Ogle v. Vickers*, 4 Ad. & Ell. 782.

the parties, the tenancy may be determined as we have already observed (*a*), in three several ways. First, by the efflux of time, or the happening of a particular event. Secondly, by a notice from the landlord to the tenant to deliver up the possession, or *vice versa*; and, thirdly, by a breach on the part of the tenant of any condition of his tenancy, as by the non-payment of rent, or non-performance of a covenant.

When the tenancy is determined by the efflux of time, if the demise be by deed, or other writing, the lessor has only to prove the counterpart of the lease by one of the subscribing witnesses; and it is not necessary that he should have given notice to the tenant to produce the original lease, to enable him so to do (*b*). If there is no counterpart, notice to produce the original lease should be given, and then, but not otherwise, the claimant will be entitled, if the original lease be not produced, to give secondary evidence of its contents. If the demise be by parol, the agreement may be proved by any person present at the making of it; but if it should appear on the trial by the witnesses on the part of the plaintiff, that a written agreement has at any time been drawn up between the lessor, and the party under whom the defendant came into possession, it must be produced by the plaintiff (*c*). It is not necessary for the lessor when the tenant holds under a lease, to prove that he, or those under whom he claims, has received the reserved rent within the last twenty years (*d*).

Where the tenancy is determined by the happening of a particular event, the lessor must of course also prove, that the event, upon which the tenancy is to determine, has happened.

When the tenancy expires by reason of a notice to quit,

(*a*) *Ante*, 73, 74.

6 Bing. 533.

(*b*) *Roe d. West v. Davis*, 7 East, 363.

(*d*) *Orrell v. Maddox*, Runn. Eject. Appen. 458. *Doe d. Davey*

(*c*) *Fenn d. Thomas v. Griffith*,

v. Oxenden, 7 M. & W. 131.

the lessor must prove the tenancy of the defendant, the service of the notice and its contents, (and if given by an agent, the agent's authority) (*a*), and that the notice and the year of the tenancy expire at the same time. When also the notice is for a shorter period than half-a-year, or expires at any other period than the end of the year of the tenancy, it will be necessary to show the custom of the country where the lands lie, or an express agreement, by which such notice is authorised (*b*).

The tenancy of the defendant is commonly admitted, and may be proved when necessary, if no direct evidence can be given of the demise, by declarations on the part of the tenant, the fact of payment of rent (and it is advisable to give the tenant notice to produce his receipts) or the like.

The service of the notice (*c*), and the authority to serve it, will be proved by the person who delivered it to the tenant; but if there is a subscribing witness thereto, such subscribing witness must also be called (*d*), although it should happen that he only witnessed the signature of the landlord, and did not deliver the notice himself. The contents of the notice may be proved by a duplicate original, which should be compared with the notice actually served, by the party serving it; but if this precaution is not taken, parol evidence may be given of its contents; and it is not necessary in either case, to give the defendant notice to produce the original in his possession (*e*).

In a case in which it was proved, that it was the usual practice in the attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and on the occasion in question the attorney himself prepared a notice to quit to serve on a tenant,

(*a*) *Ante*, 89.

(*b*) *Ante*, 103.

(*c*) *Ante*, 92.

(*d*) *Doe d. Sykes v. Durnford*,

2 M. & S. 62.

(*e*) *Jory v. Orchard*, 2 B. & P. 41.

and took it out with him together with two others prepared at the same time, and afterwards returned to the office and indorsed on the duplicate of each notice a memorandum of having delivered it to the tenant, and the attorney died before the trial, and at the trial two of the notices were proved to have been delivered by him to the tenants on the day when he so took the notices out with him ; it was held, that the indorsement made by him on the third notice was admissible in evidence to prove its service (*a*).

When the notice is given by an agent, it must be shown that he was vested with his authority at the time the notice was given (*b*). And where two or more joint tenants, &c., are lessors of the plaintiff, and a notice to quit is given by one or more in the name of all, although they all afterwards join in an ejectment, it will not be presumed, from that circumstance, that an authority was originally given by the parties not joining in the notice, to their co-tenants (*c*). But where a notice to quit was given by the steward of a corporation, it was presumed, inasmuch as he was an officer of the corporation, that he had an authority to give the notice (*d*).

When the tenant has been long in possession of the premises, it frequently becomes extremely difficult to prove the time of his original entry ; but nevertheless, some evidence must be given, from which the jury may presume that the time of the expiration of the notice and of the year of the tenancy are the same, or the plaintiff will be nonsuited.

If the tenant has been applied to by his landlord respecting the time of the commencement of his tenancy, and has informed him that it began on a certain day, and in consequence

(*a*) *Doe d. Patteshall v. Turford*,
3 B. & Ad. 890.
(*b*) *Ante*, 88.

(*c*) *Ante*, 89.
(*d*) *Roe d. Dean of Rochester v.*
Pearce, 2 Campb. 96.

of such information, a notice to quit on that day is given at a subsequent period, the evidence is conclusive upon the tenant, and he will not be permitted to prove that in point of fact the tenancy has a different commencement: nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into an error (*a*). When also the tenant at the time of the service of the notice assents to the terms of it, he will be precluded from showing that it expires at a wrong time. But such assent must be strictly proved; and in a case where the party made no objection to the notice at the time of its delivery, but said, "I pay rent enough already, it is hard to use me thus;" it was held that these circumstances were not sufficient to prevent him from showing the time when the tenancy actually commenced (*b*).

When a notice to quit upon any particular day, is served upon the tenant personally, if he read its contents, or they be explained to him, without any objection being made on his part, as to the time of the expiration of the notice, it will be *prima facie* evidence of a holding from the day mentioned in the notice (*c*). In like manner, a receipt for a year's rent up to a particular day, is *prima facie* evidence of a holding from that day (*d*). But if the notice be not delivered personally, or be not read over or explained to the party, no such presumption will arise, although a contrary doctrine was formerly maintained (*e*). When also the notice is to quit generally at the expiration of the current year of the tenancy, &c. (*f*), no presumption can arise, as to the time of the commencement of

(*a*) Doe d. Eyre v. Lambley, 2 Esp. 635.

(*b*) Oakapple d. Green v. Copous, 4 T. R. 361.

(*c*) Thomas d. Jones v. Thomas, 2 Campb. 647; Doe d. Clarges v. Foster, 13 East, 405; Doe d. Lei-

cester v. Biggs, 2 Taunt. 109.

(*d*) Doe d. Castleton v. Samuel, 5 Esp. 174.

(*e*) Doe d. Puddicombe v. Harris, 1 T. R. 161; Doe d. Ash v. Calvert, 2 Campb. 387.

(*f*) *Ante*, 104.

the tenancy, from a personal delivery to the tenant. But where a general notice was delivered on the 22nd of March, to quit at the expiration of the current year, &c., and on the 16th of January following, a declaration in ejectment was delivered to the tenant, laying the demise on the 1st of November, and the tenant on the receipt of this declaration made no objection to the notice to quit, nor set up any right to the possession of the premises, but said he should go out as soon as he could suit himself with another house, it was ruled by Lord Ellenborough, C. J., that the defendant's declaration, when served with the ejectment, was evidence to go to the jury, whether the holding was a Michaelmas holding, and the jury found a verdict for the landlord (*a*). And in a case where the notice was delivered on Sept. 27, to quit "at the expiration of the term for which you hold the same," which notice was served personally upon the tenant, who observed, "I hope Mr. M. does not mean to turn me out," Holroyd, J., permitted the lessor to prove, that it was the general custom, in that part of the country where the demised lands lay, to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively, and directed the jury to presume, that this tenancy, like other tenancies in that part of the country, was a tenancy from Lady-day to Lady-day (*b*).

Where the sole evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment, and show on whose behalf it was received (*c*).

When the ejectment is brought upon a clause of re-entry for non-payment of rent, if the proceedings are at common

(*a*) Doe d. Baker v. Wombwell, MS.
2 Campb. 559.

(*b*) Doe d. Milnes v. Lamb. Nottingham Summer Assizes, 1817,

(*c*) Doe d. Harvey v. Francis, 2
M. & R. 57.

law, the lessor must prove the lease, or counterpart (*a*), and that the rent has been demanded with all the formalities mentioned in a preceding chapter (*b*). If the case falls within the provisions of the statute 4 Geo. II. c. 28, instead of proving a demand of rent, he must show that six months' rent is in arrear, and that there is not a sufficient distress upon the premises (*c*). In order to prove the latter fact, evidence must be given that every part of the premises has been searched; and in a case where the party who was about to make the distress, omitted to enter a cottage upon the premises, the Court considered the search insufficient (*d*). But if the lessor show that he was prevented by the defendant from entering on the premises, proof that there was no sufficient distress will be dispensed with (*e*). If there be a sufficient distress to countervail the arrears of rent, in respect of which the forfeiture is incurred, it will be an answer to the action, although the distress be not sufficient to meet any further arrears remaining due.

The search must, of course, be made after the time when the rent became due, and also after the expiration of the time when it was payable to save the forfeiture (*b*); but it is not necessary for the plaintiff to prove that there was no sufficient distress upon the premises, throughout the whole period of time during which the rent has been in arrear. If he proves that on any one day, from the time when the rent became due, to the day of the demise in the declaration, there was no sufficient distress, it will entitle him to a verdict. And even if he proves that there was not a sufficient distress, on some day *after* the day of the demise; as, for example, on *some day* in May, (the demise being laid on May 2), it will be sufficient *prima facie* evidence to call upon the defendant to show, that there was a

(*a*) Roe d. West v. Davis, 7 East, 363.

(*b*) *Ante*, 121.

(*c*) *Ante*, 122.

(*d*) Doe d. Powell v. King, Forrest, 19.

(*e*) Doe d. Chippendale v. Dyson, 1 M. & M. 77.

sufficient distress upon the premises within the terms of the proviso (a).

It is not necessary that the amount of rent proved to be due should correspond with the amount stated in the particulars of breaches delivered by the plaintiff (b).

When the ejectment is for the breach of any other covenant, the lessor must show the covenant broken, by the same evidence as in an action of covenant; and if he has been ordered by the Court to give to the tenant particulars of the breaches upon which he means to rely, he will be precluded from giving in evidence different breaches from those contained in the particulars. A breach of covenant by mismanagement in overcropping, and by deviating from the usual rotation of crops, has been held to be inadmissible in evidence under particulars for breaches, "by selling hay and straw off the land, removing manure, and *non cultivation*." (c)

In an ejectment on a proviso for re-entry, for breach of covenant not to assign or let the premises, it was ruled by Lord Alvanley, C. J., that if a person was found in possession acting and appearing as tenant, it was sufficient *prima facie* evidence of an under-letting to call upon the defendant (the lessee) to show in what character such person was upon the premises; and that the declarations of such person were admissible in evidence against the lessee (d). But in a subsequent case, upon similar evidence of possession, (accompanied, indeed, by a declaration of the party that he had taken the premises from a third person, but which does not seem to form the ground of the decision) Lord Ellenborough, C. J., directed a nonsuit; observing, that upon such evidence,

(a) Doe d. Smalt v. Fuchau, 15 East, 286.

(b) Tenny d. Gibbs v. Moody, 3 Bing. 3.

(c) Doe d. Winnal v. Broad, 2 M. & G. 523.

(d) Doe d. Hindley v. Rickarby, 5 Esp. 4.

non constat, that the party was not a tortious intruder, that it was incumbent on the lessor to prove that the lessee had either *assigned* or *let*, and that the evidence produced would not be sufficient, even if the lessee had covenanted *not to part with the possession* (a).

In ejectment against a tenant for a forfeiture, it is a good defence that the landlord after the execution of the lease, conveyed away his title to the premises by mortgage, although it be not shewn that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant (b).

In an ejectment for not insuring, it lies upon the claimant to prove that no insurance has been effected, and the circumstance that defendant refused to shew the policy, when the plaintiff required him, and the non-production of it at the trial after notice, are not *prima facie* evidence against him (c).

If the claimant is the assignee of the reversion, after proving the forfeiture, evidence must be given that he was entitled to the reversion at the time the forfeiture was committed (d), and if possible of the mesne assignments from the original lessor. These mesne assignments, however, will be presumed, if the original lease be for a long term, and the possession of the assignee has continued for a considerable time (e).

We must now consider the cases in which questions have

(a) Doe v. Payne, 1 Star. 86.

(b) Doe d. Marriott v. Edwards, 5 B. & A. 1065.

(c) Doe d. Bridger v. Whitehead, 3 Nev. & P. 557. The difficulties attendant on the proof that no insurance has been effected are from the great number of insurance offices

almost insuperable. It is prudent in order to avoid these inconveniences, to limit the covenant to an insurance in some particular office.

(d) Ante, 55. 148.

(e) Earl d. Goodwin v. Baxter, Blk. 1228.

arisen as to the right of tenants to dispute their landlord's title.

It may be laid down as a general rule, that a person defending as landlord is bound by the same estoppels as the tenant himself, and that a party who gets possession of premises from the lessor of the plaintiff by any fraud or trick upon him cannot set up his own title, or a title in a third person, in answer to the action (*a*).

A party also who defends as landlord is estopped from objecting that the occupiers of the premises, who have suffered judgment to go by default, are tenants to the lessor, and have not received notice to quit from him (*b*).

The lessor of the plaintiff had demised the premises from year to year to a mining company, and had given to them a notice to quit on the day of the demise; he was a partner in the company, and the defendant, who was another partner in the company, defended on their behalf. The defendant was estopped from disputing the title of the claimant, although he had admitted in an answer in Chancery which was in evidence that he had no legal title to the premises (*c*).

S., the husband of *A.*, being in possession of lands, made a conveyance of them in fee; but it was verbally agreed, between him and the purchaser, that during the joint lives of the purchaser and *S.*, the possession of *S.* should not be disturbed. The purchaser died, and *S.* received notice to quit. He also

(*a*) *Doe d. Knight v. Lady Johnson v. Baytup*, 3 Ad. & Ell. Smythe, 4 M. & S. 447; *Doe d.* 188.
Earl Manvers v. Mizim, 2 M. & R. 56; *Doe d. Mee v. Litherland*, 4 Ad. & Ell. 784; *Doe d. Bullen v. Mills*, 2 Ad. & Ell. 17; *Doe d.*

(*b*) *Doe d. Davis v. Creed*, 5 Bing. 327.

(*c*) *Francis v. Doe d. Harvey*, 4 M. & W. 331.

died, the notice having expired, and *A.*, the widow, retained possession. In ejectment brought against her by the purchaser's representatives, it was held, that she could not set up against them the title of a party to whom her husband, before the above-mentioned conveyance, had given a mortgage for 1000 years (*a*).

H. having no title was let into possession by the owner, and *L.* came to reside with and attend upon him. *H.* afterwards died, having devised the premises to the lessor of the plaintiff, and continued to reside. Upon ejectment brought, the defendants (professing to have a claim under the original proprietor) defended as landlords, but at the trial gave no evidence of title in themselves; it was held, that *L.* having come into possession under *H.*, the defendants were estopped from showing the circumstances under which *H.* entered (*b*).

G. demised premises to *D.* who entered and paid rent. During the term, a third party, *T.*, disputed *G.*'s title, and they agreed to be bound by the opinion of a barrister, who decided in *T.*'s favour. *G.* therefore delivered up the title deeds, and permitted *T.*'s attorney to tell *D.*, the tenant, that he must in future pay the rent to *T.* as his landlord. It was held, that *G.*'s claim of title as landlord to *D.* had expired; that his conduct amounted to an admission of that fact; and that *D.* was not estopped from alleging it. (*c*).

Previous to 1812, a person built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the premises to the defendant. It was held in ejectment by the landlord of the adjoining land that the defendant was estopped from

(*a*) *Doe d. Leeming v. Skirrow*, 9 Ad. & Ell. 662.
7 Ad. & Ell. 157.

(*b*) *Doe d. Willis v. Birchmore*, 256.

(*c*) *Downs v. Cooper*, 2 Q. R. R.

denying the title of the tenant, and the tenant from disputing that of the landlord (*a*).

A. demised to *B.*, and afterwards being embarrassed assigned to *C.*, and requested *B.* to attorn to *C.*, (suppressing the facts of his insolvency), which *B.* accordingly did, and subsequently agreed with *C.* to give up possession at a particular day.—*A.* became bankrupt, *B.* remaining in possession, and *C.* brought an ejectment upon the agreement. The assignees defended as landlords. It was held, that these acknowledgments did not estop *B.* or the assignees, as representing him from contesting *C.*'s title; such acknowledgments having been made in consequence of *A.*'s representations, in which he suppressed the facts rendering the assignment invalid (*b*).

Thirdly, when the defendant has been let into possession by the owner, under circumstances by which the relationship of landlord and tenant, has not been constituted.

It is impossible to point out the evidence requisite in all the various cases, arising under this division of the subject. Each case must depend on its own peculiar circumstances, and it is enough therefore, to say generally, that the claimant must give evidence of the circumstances under which possession was taken, and that the defendant's right to such possession has ceased. If, for example, he was let into possession pending a negotiation for a purchase, it must be proved that he was so let into possession, and that the negotiation has been broken off. If he took possession under a void lease or agreement, the instrument must be produced and proved. If by leave and license, or as tenant at will, that the license has been revoked, or the will determined by demand of possession or otherwise, and so forth; and this general rule must be always attended to,

(*a*) *Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17.

(*b*) *Doe d. Plevin v. Brown*, 7 Ad. & Ell. 447.

namely, that the right of possession in the defendant must be terminated before the day of the demise in the declaration.

Lastly ; Of the evidence on the part of the defendant.

The principle that a claimant in ejectment must recover on the strength of his own title, is now so clearly established that little can be said respecting the evidence necessary on the part of the defendant. The lessor of the plaintiff must always, in the first instance, make out a clear and substantial title to the premises in question ; and the defendant's evidence is altogether confined to falsifying his adversary's proofs, or rebutting the presumptions which may arise out of them. He needs not show that he has himself any claim whatever to the premises, nor give evidence of a title in a third person ; it is sufficient if he make it appear to the jury, that a legal title does not subsist in the plaintiff's lessor. Thus, when the lessor claims as heir, he may show a devise by the ancestor to a stranger ; that by a particular custom another, and not the claimant, is the heir ; that the claimant is a bastard ; or any other circumstances which will invalidate his title. In like manner when the lessor claims as devisee, the defendant may show, that the will was obtained by fraud ; that it was not duly executed ; that the testator was a lunatic ; and so forth. And as the same principle holds, whatever be the title of the claimant, any particular directions respecting the defendant's proofs are altogether unnecessary. It is sufficient to observe generally, that the defendant's evidence entirely depends on the nature of the proofs advanced by the plaintiff's lessor, and need in no case to be extended beyond the rebuttal of them.

CHAPTER X.

Of the Trial and subsequent Proceedings.

THE claims of the parties being prepared for the decision of a jury, by means of the fictions, conditions, and proofs, described in the preceding chapters, the trial with its incidents, and the subsequent proceedings, will now occupy our attention.

The death of the lessor of the plaintiff, although he be only tenant for life, will not abate the action, nor can it be pleaded *puis darrein continuance*; because the right is supposed to be in his lessee, (the plaintiff,) who may proceed for the damages occasioned by the supposed ouster, although he cannot obtain possession of the land (*a*); but a trial of this nature is unknown in practice, for the damages in ejectment are only nominal, and if the plaintiff be nonsuited from the refusal of the defendant to appear at the trial, the executor of the lessor will not be entitled to his costs, for the consent rule is merely personal (*b*).

If the defendant refuses at the trial to appear, and confess lease, entry, and ouster, the plaintiff must be nonsuited, unless the action be at the suit of a landlord against his tenant, in which case it is optional with the lessor of the plaintiff to be nonsuited, or proceed with the trial. If he adopt the latter course, he must produce the consent rule and undertaking of the defendant (which by stat. 1 Geo. IV. c. 87, s. 2, is made evidence of lease, entry, and ouster,) which will entitle him

(*a*) *Thrustout d. Turner v. Grey*,
Stran. 1056.

(*b*) *Thrustout v. Bedwell*, 2 Wils.
7.

after proof of his right to the demised premises, to recover the mesne profits, accruing from the day of the determination of the tenant's interest to the time of the verdict, or to some preceding day to be specially mentioned therein.

The landlord has also, by the same statute, a like privilege with regard to the recovery of the mesne profits, in case of the appearance of the tenant at the trial; but the statute does not extend to cases in which the relation of landlord and tenant does not exist.

If there be two defendants one of whom defends as landlord, and the other as tenant, and they defend by different counsel and attornies, but the tenant claims no title but what he derives from the landlord, one counsel only will be permitted to address the jury, but both may cross-examine and also call witnesses (a).

In addition to the general authority given to the presiding Judge in all actions, by stat. 1 Wm. IV. c. 7, to grant certificates for immediate execution, he is authorized by the stat. 1 Wm. IV. c. 87, s. 32, in all cases of trials of ejectments, when the verdict shall pass for the plaintiff, or he shall be nonsuited for want of the defendant's appearance to confess lease, entry, and ouster, to certify on the back of the record that a writ of possession ought to issue immediately, and such writ shall thereupon issue (b).

The Judge is also *authorized* when the rule required by stat. 1 Geo. IV. c. 87, s. 1, has been entered into by the defendant (c), to stay the execution of the judgment absolutely, until the fifth day of the ensuing Term, if he shall think the finding of the jury was contrary to evidence, or that the

(a) Doe d. Hogg v. Tindale and Another, 3 C. & P. 565.

(b) Appendix, No. 37.

(c) *Ante*, 223.

damages were excessive; and is *compelled* so to stay the execution, upon the requisition of the defendant, upon his undertaking to find, and within four days from the trial actually finding security, by the recognizance of himself and two sufficient sureties in such reasonable sum as the Judge shall direct, not to commit any waste or wilful damage, or sell, or carry off any standing crops, hay, straw, or manure, from the premises, from the day of the verdict until the day of execution (a).

The omission of the date of the year of the demise cannot be amended at *nisi prius*, under stat. 3 & 4 Wm. IV. c. 42, s. 23, because it is not a question of variance between the declaration and the proof, for the day in the declaration is applicable to that day in any year, and it is, if anything, a defect in the declaration itself. Nor is such an omission a ground of nonsuit (b).

Two cases only are reported as to the rules by which the Judge at *nisi prius* should be guided in granting amendments under the above statute. In one of them in which the ejectment was brought on a forfeiture, and the amendment asked was to correct a misdescription of the parish, Parke, J. allowed the amendment, and intimated a strong opinion that "parties must not come down to trial on the ground that there was a variance in the record, which they supposed a Judge would not rectify (c)." In the other case two tenants in common had declared on a joint demise, and Taunton, J., in answer to an application for leave to amend by substituting several demises, refused to allow the amendment, declaring that it was one which he had not authority to make, being in a particular way material to the merits of the case (d).

(a) 1 Geo. IV. c. 87, s. 3.

1 M. & Rob. 319.

(b) Doe d. Parsons v. Heather,
8 M. & W. 158.

(d) Doe d. Poole and Another v.
Errington, 1 M. & Rob. 343.

(c) Doe d. Marriott v. Edwards,

When the plaintiff is nonsuited, from the defendant's refusal to appear and confess, the cause of the nonsuit should be specially indorsed upon the *postea*, in order to entitle the plaintiff to have his costs taxed and allowed, upon the consent rule (*a*); and also to enable him (in case the Judge should refuse under stat. 1 Wm. IV. c. 70, s. 38), to have judgment entered against the casual ejector (*b*).

With respect to the time of entering this judgment, a considerable difference prevails between the practice of the Court of King's Bench, and of the Common Pleas: the judgment being signed, and the execution taken out, in the latter Court, immediately after the entering of the nonsuit, and, in the former, not until the day in bank when the *postea* should be returned (*c*); and it is to be regretted that two of the superior Courts should differ on a point so essential to the regular administration of justice.

If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, indorsing upon the *postea*, that such verdict is entered for them, because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession (*d*).

If there be any material variance between the issue and the

(*a*) *Ante*, 223.

(*b*) *Turner v. Barnaby*, Salk. 259; Appen. No. 33.

(*c*) *Doe d. Palmerston v. Copeland, et Throgmorton d. Fairfax v. Bentley*, 2 T. R. 779; *Doe d. Davies v. Roe*, 1 B. & C. 118.

(*d*) *Claxmore v. Searle*, Lord Raym. 729; B. N. P. 98. Formerly, if some of the defendants

did not appear, the plaintiff was nonsuited as to all, because *all* the defendants not admitting *the demise*, he could not maintain his declaration. The present practice was adopted in the reign of William III. (*Haddock's case*, 1 Vent. 355). *Fagg v. Roberts*, 2 Vent. 195.

record, it seems that the defendant should nevertheless appear at the trial, and afterwards move the Court to set aside the verdict for the variance (*a*); because if he do not appear, he is out of Court, and cannot afterwards properly move to set aside the nonsuit; yet, upon a motion of this nature, the Court did, in one case, grant the rule upon payment of costs (*b*), and in another case stayed the proceedings (*c*).

If the demise should be laid on a day not come at the time of the trial, the defendant must notwithstanding appear and confess, as the plaintiff would otherwise be nonsuited, and entitled, under the consent rule, to judgment against the casual ejector (*d*).

If the property litigated be of great value, and difficulties are likely to arise in the course of the trial, the Court will grant a trial at bar; and the motion for this purpose may be made by either party. But the mere value of the premises (*e*), or the probability of a protracted trial, will not be sufficient to induce the Court to grant the application; *difficulty* must concur; and therefore the motion must be supported by affidavits stating the value *per annum* of the estate, and the particular circumstances which render the trial at bar necessary; as that the title of the lessor of the plaintiff will depend on an intricate course of descent or the legal operation of deeds, and that various points of law, and other questions, will necessarily arise at the trial; and in some authorities it is laid down that it is not sufficient to swear generally, that the cause is expected to be difficult, but that the expected difficulty ought to be pointed out (*f*); and a trial at bar has been refused, on the

(*a*) *Ante*, 230.

(*b*) *Jones d. Thomas v. Hengest*, Barn. 175.

(*c*) *Law v. Wallis*, 1 Barnard. 156.

(*d*) *Anon. Ld. Raym.* 798; *Small d. Baker v. Cole*, Burr. 1159.

(*e*) Lord Sandwich's case, Salk. 648.

(*f*) *Rex v. Burgesses of Caermarthen*, Say, 79; 2 Lil. P. R. 740; *Goodright v. Wood*, 1 Barnard. 141.

mere allegation of length, and probable questions of difficulty in a case respecting a pedigree (*a*).

It has also been said, that the rule is not to allow a trial at bar, unless the yearly value of the land amounts to a hundred pounds (*b*).

In other actions, a rule for a trial at bar is never granted before issue joined; but as the issue in ejectment is very seldom joined until after the end of Term, when it would be too late to make the application, the motion in this action may be granted even before appearance (*c*).

As the granting of a trial at bar is a *favour*, the Courts exercise a power of annexing conditions to the grant. Thus where the lessor of the plaintiff was unable to bear the expense, and one of his witnesses was above eighty years of age, the Court imposed upon the defendant the condition, if he succeeded, he should only have *nisi prius* costs, but if the lessor succeeded he should have bar costs, the old witness to be examined on interrogatories, and her deposition read, in case of her death before trial. It was also made part of the rule, that the cause should be tried by a Middlesex jury, instead of one from Norfolk, where the premises were situated (*d*). And in another case, where the lessor had had a rule for a trial at bar, but having laid the demise by a wrong person, had discontinued the action, and brought a new ejectment; the Court would not grant him a second rule for a trial at bar, until he had paid the costs of the former ejectment (*e*).

(*a*) Tidd, 768.

(*b*) Goodright *v.* Wood, 1 Barnard, 111.

(*c*) Roe *d.* Cholmondley *v.* Doe, Barn. 455.

(*d*) Holmes *d.* Brown *v.* Brown, Doug. 437.

(*e*) Lord Coningsby's case, Stran.

548.

After verdict the successful party is of course entitled to the judgment of the Court; and, unless when the statute 1 Geo. IV. c. 87, and 1 Wm. 4, c. 70, provide otherwise, the same time is allowed to the other party to move for a new trial, or an arrest of judgment, in ejectment, as in other actions.

The Courts will seldom grant a new trial in ejectment, when the verdict is for the defendant, because all parties remaining in the situation they were, previously to the commencement of the action, the claimant may bring a second ejectment without subjecting himself to additional difficulties; but this principle does not apply when the verdict is against the defendant. The possession is then changed. The defendant in the first ejectment becomes the plaintiff's lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point of material consequence to him, "the Courts (to use Lord Mansfield's words) rather lean to new trials on behalf of defendants in the case of ejectments, especially on the footing of surprise" (a).

OF THE JUDGMENT.

By the judgment in ejectment, the plaintiff's lessor obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had. If therefore, he has a freehold interest in them, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and if he has no title at all, he is in as a trespasser, and liable to account for the profits to the legal owner, without any re-entry on his part (b). Since, then, the claimant has a mere *possession* given to him by the judgment, it may be asked how he

(a) *Clymer v. Littler*, 1 Blk. 345, 348.

(b) *Taylor d. Atkins v. Horde*, Burr. 60, 90, 114.

can become *seised* according to his title if he have more than a chattel interest in the land. This is effected by another fiction. It is a rule of law, that when a man having a title to an estate comes into possession of it by lawful means, he shall be in possession according to his title; and therefore when *possession* is once given by the sheriff, the possession and title are said to unite, and the plaintiff's lessor holds the lands according to the nature of his interest in them.

As the judgment is grounded on the verdict, it ought not to be entered up for more land, or for different parcels, than the defendant was found guilty of, though a variance between the verdict and judgment, occasioned by the misprision, or default, of the clerk in entering the judgment, may be amended by the Court, even after a writ of error brought (*a*).

The Courts, indeed, after judgment, make every possible intendment in favour of the claimant; and if the title declared on can by any means be supposed to exist, consistently with the judgment, such judgment will be supported. Thus, where two demises were laid, by different lessors, of the same premises for the same term, both as to commencement and duration, and the judgment was that the plaintiff recover his *terms* in the premises; and it was objected, that both lessors could not have a title to demise the whole; and that therefore there was an inconsistency in the judgment, and that it did not appear which of the lessors' rights was established, the Court affirmed the judgment; because, after a verdict, a bare possibility of title consistent with the judgment is sufficient, and the two lessors might have been joint tenants, and yet refuse to join in a lease (*b*). In like manner where the declaration contained two distinct demises, by two different lessors, of two distinct undivided thirds, and judgment was given that the

(*a*) *Mason v. Fox*, Cro. Jac. 631; Appendix, No. 34.

(*b*) *Morres v. Barry*, Stran. 1186; *ante*, 209.

plaintiff "*do recover his said terms,*" and on error it appeared (from the facts stated in a bill of exceptions to the Judge's directions on a point of law) that the ejectment respected only one undivided third, the judgment was held well enough, when the point was only raised on a bill of exceptions, and *semble* that it would have been well even on a special verdict (a). Upon the same principle, when in an ejectment on two several demises of two separate parcels of lands, the judgment was entered, that the plaintiff do recover his *term*, and an objection was taken, that it should have said, that the plaintiff do recover his *terms*, the Court said they would extend the word *term* to his *term* in *A.*, and his *term* in *B.*, and affirmed the judgment (b). And where the ejectment was upon two demises, by different lessors, and the second demise was "*of the aforesaid premises,*" and the judgment was entered for the plaintiff as to the first demise, and the defendant as to the other; and it was objected, that from not stating the second demise to be of "*other premises,*" the judgments were contradictory to each other, inasmuch as the defendant was put without day, as to the same premises for which the plaintiff recovered, the Court affirmed the judgment, and construed *the aforesaid premises which the second lessor demised* to mean the term in the premises (c). So also, where the plaintiff in ejectment declared upon two demises of several lands, by several parties, but laid only one *habendum*, namely *habendum tenementa prædicta*, so demised by the aforesaid several parties, for seven years, and it was assigned for error, that the declaration was ill for want of another *habendum*; for that the verdict was general, and it was uncertain to which demise the single *habendum* related, the Court held that *reddendo singula singulis*, it was well enough (d). Where also the declaration

(a) Rowe d. Boyce v. Power, 2 N. R. 1, 35.

(b) Worrall v. Bent. Stran. 835.

(c) Fisher v. Hughes, Stran. 908.

(d) Sleabourne v. Bengo, 1 Ld. Raym. 561; Moore v. Fursden, 2 Vent. 214; S. C. Carth. 224; S. C. Comb. 190.

was for lands, and common of pasture generally, without stating the common to be appendant, or appurtenant, it was intended after verdict, on a writ of error, to be such common as ejectment could be maintained for (*a*). And where the ejectment was for one messuage, or tenement, and four acres of land to the same belonging, the words "to the same belonging" were held to be void; for land cannot properly belong to a house, and then it is a declaration of a messuage or tenement, and four acres of land, which though it be void for the tenement, is good for the *land*; for which the plaintiff, upon releasing the damages, had judgment (*b*).

Upon a similar principle, where the plaintiff, in the *first* year of the reign of Geo. III. declared upon a demise of the *thirty-third* year of that reign, the Court held that it was well enough after verdict, because it was only a title defectively set out, and there could be no doubt but that a proper title was proved at the trial (*c*).

If the plaintiff obtain a verdict for the whole premises demanded, the entry of the judgment is, that the plaintiff recover his term against the defendant of and in the premises aforesaid, or that he recover possession of the term aforesaid. And this form is also used, where a moiety, or other part, of the whole premises is recovered; as, for example, when the plaintiff declares for forty acres in *A.*, and recovers only

(*a*) *Newman v. Holdmyfast*, Stran. 54; *ante*, 17.

(*b*) *Wood v. Payne*, Cro. Eliz. 186. In an old case, where the plaintiff declared on a lease of a house, ten acres of land, twenty acres of meadow, and twenty acres of pasture, by the name of "a house and ten acres of meadow, be the same more or less," and had a verdict, the judgment was arrested;

because the declaration was so uncertain and repugnant, that even the verdict could not help it, the land mentioned in the declaration being so different from that mentioned in the pernomens. (*Anon. Yelv.* 166). But *quære* if such a verdict would not now be good for the ten acres?

(*c*) *Small d. Baker v. Cole*, Burr. 1159.

twenty; and it is at the lessor's peril, that he take out execution for no more than he has proved title to (*a*). But where the verdict is for some parcels and not for all, or part of all, as where the plaintiff declares for land in *A.*, and lands in *B.*, and the defendant is found guilty in *A.* only, the judgment (*b*) is, that the plaintiff recover his term in *A.*; and as to the other part, whereof the jury acquitted the defendant, that the plaintiff be in mercy, and that the defendant go thereof without day (*c*).

If the defendant be acquitted of part, and judgment be entered, *quod defendens sit quietus quoad* that part whereof he is acquitted, this is error; for the judgment in this action is not final, as in a writ of right; nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action (*d*).

If a sole defendant die after the commencement of the assizes and before verdict, or after verdict and before judgment, it will not abate the suit; nor can his death be alleged for error, provided the judgment be entered within two Terms after the verdict (*e*).

When there are several defendants, and one of them dies at any time before judgment, the lessor may proceed against the survivors, upon suggesting the death (*f*) of such defendant upon the plea roll: the suggestion need not also be entered upon the *nisi prius* roll; for it is sufficient if it there appear to the Judge, what he is to try and between whom; nor need the

(*a*) Doe d. Drapers' Company v. Wilson, 2 Star. 477.

(*b*) As an ejectment is an action of trespass *vi et armis*, the judgment before the statute of 5 & 6 W. & M. c. 12, used to run *quod defendens capiatur*; but, since that statute, such entry is no longer ne-

cessary. (Linsey v. Clerk. Carth. 390; S. C. 5 Mod. 285).

(*c*) Judgment Book, 72, 73.

(*d*) Taylor v. Wilbore, Cro. Eliz. 768.

(*e*) 17 Car. II. c. 8.

(*f*) 8 & 9 Wm. III. c. 11, s. 7.

judgment say, *quod quærens nil capiat per breve* against the dead defendant (a).

If one of several defendants die before verdict, it is the better way to suggest his death on the roll before the trial, and to award a *venire* to try the issue against the surviving defendants (a); although where in such case the *venire* was awarded against all, upon suggesting the death of one upon the roll after the verdict, the plaintiff had judgment for the whole against the others (b). But if the lessor proceed to trial, and obtain judgment against all the defendants, without such suggestion, it is error, because there can be no verdict, or judgment, against a person not in being (c).

The entry of the judgment, notwithstanding the death of one of several defendants, ought to be general, that the plaintiff recover his term in the premises against the survivors (d); but execution must not be taken out for more than the plaintiff has a right to recover.

It seems that if the defendants make a joint defence for the whole land demanded, and one of them die, execution may be given of the whole, because the whole interest comes by survivorship to the others, and therefore the plaintiff hath still persons before the Court to defend the whole; but that where each of the defendants makes a defence for part only, the plaintiff, upon the death of one of them, must not take out execution for the part in his possession, because they are in the nature of distinct defendants, and consequently, as to that part which was defended by the person deceased, there is no person in Court against whom judgment can be given, or execution taken out (e).

(a) *Far v. Denn*, Burr. 362.

(b) *Gree v. Rolle*, *Ld. Raym.*

(c) *Gilb. Eject.* 98.

(d) *Far v. Denn*, 1 Burr. 362.

If an ejectment be brought against baron and *feme*, and the plaintiff have a verdict against *both*, but, before judgment, the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; because (having been found guilty of the trespass) she must have obtained the unlawful possession *jointly* with her husband, or have had the whole possession in her own right; and in either case, the possession is wholly in her on the death of her husband (*a*).

An opinion has generally prevailed, that a judgment in ejectment is not in any case admissible in evidence in a subsequent ejectment, but it now appears to be settled that where the parties, the premises, and the demise, are the same in both actions, the judgment in the first action is evidence in the second, as against the party against whom it was recovered (*b*). The value of such evidence must, however, be slight; and it seems the Courts will not extend the principle. Thus, in an ejectment against *A.* on the demise of *B.*, a mortgagee, a recovery in a former ejectment subsequently to the mortgage, on the demise of *A.* against *C.* (the mortgagor), was held inadmissible for *A.* (*c*); and where *A.* and *B.* were in possession of the same premises, and *A.* let judgment go by default, and *B.* appeared, the judgment against *A.* was held not to be admissible on the trial against *B.* (*d*).

OF THE COSTS.

The general rule that persons who are not parties to the record cannot be made liable to the costs of the suit, is held not to be applicable to actions of ejectment, over which, as has already been observed, the Courts, from the fictions with which it abounds, exercise a stringent but most useful con-

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| (a) Rigley v. Lee, Cro. Jac. 356; | Doe d. Tatham, 1 Ad. & Ell. 19. |
| Lee v. Rowkeley, 1 Roll. 14. | (c) Doe d. Smith v. Webber, 3 |
| (b) Doe d. Strode v. Seaton, 2 | Nev. & M. 746. |
| C., M. & R. 731; B. N. P. 232: 4 | (d) Doe d. Morse v. Williams, 1 |
| Bac. Ab. Ev. F.; et vide Wright v. | Car. & M. 615. |

troul; and they will order the party really interested to pay costs, although he is neither the defendant on the record nor has entered into the consent rule, nor is in any manner before the Court, provided he has interfered in the suit, and carried on the defence (*a*). The ground of this distinction is, that in ejectment the action must be brought against the tenant in possession, and the Courts will therefore not permit the party really interested to put a pauper into possession to evade the costs (*a*). It is probable also (especially with reference to the late rule of Court (*b*), enabling defendants to appear and plead, although the claimant shall not have moved for judgment against the casual ejector) that the Courts will now apply this principle to the claimant as well as the defendant, and, on the ground that they can make the real party to the suit pay the costs (*c*), although a different practice formerly prevailed (*d*), direct the claimant to pay the defendant's costs, if he shall abandon the action after appearance, and refuse to join in the consent rule (*e*). But this rule will not be extended to parties who may assist the defendant, or carry on the defence for him, at their own cost, if they have no interest in the premises (*f*); nor can the party in possession recover, as costs against the claimant, the costs of any rules for setting aside proceedings for irregularities, unless he has appeared to the action, or signed the consent rule (*g*).

It would seem also from the general current of authorities, that no person who does not enter into the consent rule can be liable to the claimant for his costs; but it was ruled otherwise

(*a*) Thrustout d. Jones *v.* Shenton, 10 B. & C. 110; Doe d. Masters *v.* Gray, 10 B. & C. 615; Beckerley *v.* Dimery, 10 B. & C. 113.

(*b*) Hil. Term, 4 Vict.

(*c*) Doe d. Masters *v.* Grey, 10 B. & C. 615.

(*d*) Goodright d. Ward *v.* Badtitle, Blk. 763; Smith d. Ginger *v.*

Barnardiston, Blk. 904.

(*e*) Doe d. Williams *v.* Smith, 9 Dow. P. C. 1011.

(*f*) Doe d. Wright *v.* Smith, 8 Dow. P. C. 517.

(*g*) Doe d. Vernon *v.* Roe, 7 Ad. & Ell. 14; Goodtitle d. Murrell *v.* Badtitle, 9 Dow. P. C. 1009.

by Lord Tenterden, who directed that an order should be made upon parish officers for the payment of costs, in a case in which the action had been defended by an order of vestry, although they were no parties upon the record, saying, "in ejectment we can make the real party to the suit pay the costs (a)."

When the action is undefended, and the judgment against the casual ejector, the only remedy of the claimant for his costs, is an action for mesne profits, in which, at the discretion of the jury, they are recoverable as consequential damages.

When the party interested appears and enters into the consent rule, and afterwards at the trial refuses to confess, he is liable, upon that rule, to the payment of costs, and may be proceeded against by attachment for the recovery of them (b); but no writ of *feri facias*, or *capias ad satisfaciendum*, will lie, because the judgment is against the casual ejector (c).

When there are several defendants, some of whom appear and confess, but others do not appear, and a verdict is found against those who do appear, each defendant is liable for the whole costs, and the plaintiff's lessor may tax them all against any one or all of the defendants at the same time; that is to say, upon the *postea* against those who appear, and upon the consent rule against those who do not appear; and if after satisfaction from one defendant for the costs, he take out execution against another, the Court will interfere to prevent it. But it seems he cannot separate the costs, and tax part of them against one defendant, and part against another (d).

Where twelve defendants defended jointly, and entered into a joint consent rule, not specifying particularly the part for

(a) *Smith d. Ginger v. Barnardiston*, Blk. 904

(b) *Turner v. Barnaby*, 1 Salk. 259.

(c) *Goodright d. Rowell v. Vice*, Barn. 182.

(d) *Thrustout d. Wilson v. Foot*, B. N. P. 335; S. C. Barn. 149.

which each defendant appeared, and at the assizes, two of the defendants were allowed by the Judge to withdraw their plea, and to suffer judgment by default, but no amendment was made in the consent rule, and the case went on to trial, and the ten defendants proved their case, and obtained a verdict; it was held, that the order made at *nisi prius* should have specified the premises to be taken out of the consent rule, as well as the defendants who withdrew from the defence, and that this not having been done the plaintiff was entitled to have the verdict entered generally for him, and was entitled to the general costs of the cause, the writ of possession being limited to the premises in the occupation of the two defendants, and the ten defendants being entitled to the costs of defending for the premises to which they proved title (*a*).

Where on the trial of an ejectment on the several demises of *A.* and *B.*, the plaintiff offered no evidence as to *A.*'s title, and the defendant (who was ignorant of *B.*'s title), had prepared evidence exclusively to meet the title of *A.*; and the verdict was found for the plaintiff on the demise of *B.*, and for the defendant on the demise of *A.*, and the Master allowed the defendant his costs of the above evidence (notwithstanding an ineffectual attempt on the part of the defendant at the trial to use such evidence as applicable to *B.*'s title), the Court refused to order him to review his taxation (*b*).

If the lessor of the plaintiff die after issue joined and before trial, or even after trial and before taxation of costs, the defendant cannot recover his costs against the representative, the consent rule being (as already mentioned) merely personal; and it seems immaterial, whether the defendant's claim arises from a verdict in his favour, or from the plaintiff's being

(*a*) *Doe d. Bishton v. Hughes*, 5 Tyr. 957; 4 Dow. P. C. 412.

(*b*) *Doe d. Smith and Another v. Webber*, 2 Ad. & Ell. 448.

nonsuited upon the merits (*a*), or by reason of the defendant's refusal to confess; but where the plaintiff's lessor died after the trial, the defendant was compelled by the Court to pay to his representative the costs, which had been taxed *by consent* upon the consent rule (*b*); and it would seem that if the lessor die pending a rule for a new trial, where the verdict has been in favour of the defendant, the Court will not allow his representative to appear in support of the rule without giving security for costs (*c*).

When the tenant appears, and there is a verdict and judgment against him, execution may be taken out thereon for the costs, as in ordinary cases; and the lessor of the plaintiff may have a *capias ad satisfaciendum*, or a *fiery facias*, for the costs, and an *habere facias possessionem* for the possession, separately, or in one writ at his pleasure (*d*).

A judgment in ejectment is within the provisions of the stat. 48 Geo. 3, c. 123, s. 1, which enacts, that all prisoners in execution for any *debt* or *damages* not exceeding 20*l.* (exclusive of costs), shall be entitled to their discharge after having been in prison thereupon, for the space of twelve calendar months (*e*).

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife for the costs (*f*).

(*a*) *Thrustout v. Bedwell*, 2 Wils. 7; *Doe d. Lintot v. Ford*, 2 Smith, 407; *Doe d. Pain v. Grundy*, 1 B. & C. 284.

(*b*) *Goodright v. Holton*, Barn. 149.

(*c*) *Doe d. Cozens v. Cozens*, 1 Q. B. R. 426.

(*d*) Appendix, No. 36, 37, 38, 39, 40.

(*e*) *Doe d. Daffey v. Sinclair*, 3 Bing. N. C. 778, and the cases there cited.

(*f*) *Doe d. Taggart v. Butcher*, 3 M. & S. 557; Appendix, No. 42.

When the landlord is made defendant without the tenant, the judgment to recover the possession is against the casual ejector; but nevertheless, as there is a judgment in existence against the landlord, execution may be taken out thereon for the costs (*a*).

It may be collected from the case of *Guliver v. Drinkwater* (*b*), that, independently of these remedies, the lessor may in all cases, recover the amount of his taxed costs (*c*) in an action for mesne profits: but that the Court will not interfere to assist him, if the jury do not include such costs in their damages, when the lessor might have proceeded for them in a different manner.

When the verdict is found for the defendant, or the plaintiff is nonsuited for any other cause than the defendant's not confessing lease, &c., the costs must be taxed on the postea, and marked on the consent rule, and personally demanded of the lessor, (the consent rule being at the same time shewn to him,) and upon affidavit of such demand, and a refusal, an attachment may be obtained. It was formerly necessary to sue out a *capias ad satisfaciendum* against the nominal plaintiff, and shew that writ as well as the consent rule to the lessor; but this idle form is not longer necessary (*d*), and the rule for the attachment is properly entitled, as in an action against the casual ejector, although obtained upon affidavits entitled, as in an action against the tenant (*e*). When the lessor of the plaintiff irregularly sued out a writ of possession after the expiration of a year, without reviving the judgment by *scire facias*, he was not permitted to set off the costs on the judgment against the costs of the defendant for setting aside the execution (*f*).

(*a*) Appendix, No. 35.

2 Dow. P. C. 265.

(*b*) 1 T. R. 261.

(*e*) *Rex v Bryant*, 2 Nev. & M.

(*c*) *Doe v. Davis*, 1 Esp. 358.

666.

(*d*) *Doe d. Prior v. Salter*, 3 Taunt. 485; *Doe d. Fry v. Fry*, 2

(*f*) *Doe d. Stevens v. Lord*, 7 Ad. & Ell. 614.

When the declaration contained only one count and one demise, but claimed several messuages, and the jury found a verdict of *guilty* as to some, and *not guilty* as to one, the Court held, that under the rule of Hilary Term, 2 Wm. IV. s. 74, the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set off against those of the lessor of the plaintiff (*a*).

If the lessor be a peer, an attachment may be obtained as against his goods and chattels for non-payment of costs upon the consent rule (*b*).

In a case where baron and *feme* were lessors in ejectment, and the baron died after entering into the rule, the *feme* was held liable to the payment of the costs; because they were to be paid by the lessors of the plaintiff, and both of them were in the lease (*c*); but of course during the life of both, the attachment can only be granted against the husband (*d*).

Where the lessor was an infant, and the plaintiff was nonsuited, and the infant's father, who prosecuted the suit, was dead, the Court ordered the infant to pay the costs; yet, says the book, it was doubted, because of his infancy; but if the father had been alive, the Court would have made him pay the costs, or, if he had left assets, his executor (*e*).

If the lessor of the plaintiff sue in *forma pauperis*, he will be dispaupered in case of vexatious delay; but it does not seem, that the Court will also compel him to pay the defendant's costs (*f*).

(*a*) Doe d. Errington v. Errington, 4 Dow. P. C. 602.

(*b*) Thornby d. Hamilton v. Fleetwood, Cas. Pr. C. P. 7.

(*c*) Morgan v. Stapley, 1 Keb. 827.

(*d*) Doe d. Allanson v. Canfield, 6 Dow. P. C. 523.

(*e*) Anon. 1 Freem. 373.

(*f*) Doe d. Lippingwell v. Trussell, 6 East, 505.

When there are several defendants, the lessor of the plaintiff has his election to pay costs to which defendant he pleases (*a*).

If the lessor proceeds under the stat. 1 Geo. IV. c. 87, s. 1, and is nonsuited on the merits, or has a verdict pass against him, the defendant is entitled to double costs.

OF THE EXECUTION.

According to the old authorities when the lessor of the plaintiff prevails, he may enter peaceably upon the premises recovered, without any writ of execution, but this doctrine is much shaken by the case of *Doe d. Stevens v. Lord*, and it would now be imprudent to attempt to take possession without suing out the regular writ (*b*).

The writ of execution in ejectment is called the writ of *habere facias possessionem*, and answers to the *habere facias seisinam* in real actions; for as in the one case, the freehold being recovered, the sheriff is ordered to give the demandant *seisin* of the lands in question, so also in the other case, the *possession* being recovered, the sheriff is commanded to give execution of the *possession* (*c*).

When the landlord defends, or if the plaintiff be nonsuited because of his refusal to appear and confess, the lessor cannot sue out a writ of possession upon the judgment against the casual ejector without leave of the Court, and only a rule to show cause is granted in the first instance. But if the plaintiff obtains a verdict and judgment, he may proceed to sue out a writ of possession on such judgment without any further order (*d*).

When the writ of possession issues upon a Judge's certificate,

(*a*) *Jordan v. Harper*, Stran. Anon. 2 Sid. 155, 6.
516.

(*c*) Appendix, No. 36 to 40.

(*b*) 7 Ad. & Ell. 610; *Taylor d.*
Atkins v. Horde, Burr. 60, 88 ;

(*d*) *Doe d. Lucy v. Bennett*, 4 B.
& C. 897.

under the authority of stat. 1 Wm. IV. c. 70, s. 37, it must instead of the usual recital of a recovery by judgment, recite as directed by the statute, that the cause came on for trial at *Nisi Prius*, at such a time and place, and before such a Judge, (naming time, place and Judge) and that thereupon the Judge certified his opinion that a writ of possession ought to issue immediately (a).

If the lessor of the plaintiff be divested of his right of possession between the time when his demise is laid, and the time of issuing execution, it seems that the Court will prevent him from issuing a writ of *habere facias possessionem*, or set one aside, if issued (b).

The writ of possession is drawn up in general terms, commanding the sheriff to give to the plaintiff "the possession of his term, of and in the premises recovered in the ejectment;" but without any particular specification of the lands whereof he is to make execution; and as the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice, for the lessor of the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if the lessor take more than he has recovered in the action, the Courts will interfere in a summary manner, and compel him to make restitution (c).

They will also, if circumstances require, interfere before the execution of the writ, and restrain the lessor from taking possession of more than he is entitled to. As, where the lessor had declared for lands held under two separate titles, and by a mistake of the Judge upon the law of the case, the verdict was given for the plaintiff upon both titles, when it ought to have

(a) Appendix, No. 37.

(b) Doe d. Morgan v. Bluck, 3 Campb. 447.

(c) Roe d. Saul v. Dawson, 3 Wils. 49; Doe d. Drapers' Comp. v. Wilson, 2 Stark. 477; ante, 21.

been entered for the defendant as to the lands comprised in one of them; the Court confined the execution to the lands, to which the lessor had a valid title. (*a*)

The sheriff it seems, previously to the execution of the writ, may demand an indemnity from the plaintiff (*b*); and when he has to deliver possession of any particular number of acres, he must estimate them according to the custom of the country in which the lands are situated (*c*).

The possession to be given by the sheriff, is a full and actual possession, and he is armed with all power necessary to this end. Thus, if the recovery be of a house, and he be denied entrance, he may justify breaking open the door, for the writ cannot otherwise be executed (*d*).

If the lessor recover several messuages in the possession of different persons, the sheriff must go to each of the several houses, and severally deliver possession thereof, (which is done by turning out the tenants;) for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ; since the possession of one tenant is not the possession of the other (*e*). But when the several messuages are in the possession of one tenant only, it is sufficient if he give possession of one messuage in the name of all (*f*).

When the recovery is of land, the same distinction seems to prevail; that is to say, if there be only one tenant, a delivery of any part, in the name of the whole, will be sufficient; but

(*a*) Doe d. Foster v. Wandlass, 7 T. R. 118, *in notis*; *et vide* Brooke d. Mence v. Baldwin, Barn. 468; Roe d. Blair v. Street, 2 Ad. & Ell. 329.

(*b*) Gilb. Eject. 110.

(*c*) Roll. Ab. 886, H. 4.

(*d*) Semayne's case, 5 Co. 91, (*b*).

(*e*) 1 Roll. Ab. 886; H. 2.

(*f*) Floyd v. Bethill, 1 Roll. Rep. 420.

if there be more than one, a separate delivery of the lands in the possession of each tenant respectively must be made (a).

If the officers be disturbed in the execution of the writ, the Court will, on affidavit of the circumstances, grant an attachment against the party, whether he be the defendant, or a stranger (b): and the writ is not understood to be completely executed, until the sheriff and his officers are gone, and the plaintiff is left in quiet possession.

In an old case where the sheriff returned, that in the execution of the writ, he removed all the persons, whom upon diligent search he could find on the premises, and gave peaceable possession to the plaintiff, and that, immediately after he was gone, three men, who were secretly lodged in the house, expelled the plaintiff, upon notice of which he returned to the house to put the plaintiff in full possession, but met with such resistance that he could not do it, but at the peril of his life; the Court held that the same was no execution, and awarded a new writ (c).

In the old authorities we find it laid down, that if the lessor, after having had possession given to him by the sheriff, and before the writ of possession has been returned and filed, be again ousted by the defendant, he shall have a new writ of possession, or an attachment, and that the return of the writ is so much in the power of the plaintiff, that the Court will not, at the instance of the defendant, direct it to be returned; for the return is left to the discretion of the plaintiff, that he may do what is most for his own advantage, in order to have the benefit of his judgment; the best way to effect which is, to permit him to renew the execution at his pleasure, until full

(a) 1 Roll. Ab. 886; H. 2.

27; S. C. Salk. 321.

(b) *Kingsdale v. Man*, 6 Mod.

(c) *Upton v. Wells*, 1 Leon. 145.

execution be obtained (*a*). But this doctrine is much limited by recent decisions; and the Courts will not now grant a second writ of possession after the first has been executed, unless the expulsion shall take place within a short period after the execution, and shall be clearly brought home to the original defendants. A second writ has been granted where the expulsion was within a few days of the original execution, and refused where a period of fifteen months had elapsed; and where the party only swore to his belief that the parties committing the violence were combining with the defendants, the affidavit was held to be insufficient (*b*).

If the lessor neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by *scire facias*, as in other cases; and when the judgment is against the casual ejector, the ter-tenant must be joined in the writ (*c*).

When a sole defendant in ejectment dies after judgment, and before execution, it has been doubted whether a *scire facias* is necessary, because the execution is of the land only, and no new person is charged (*d*); but the surer method is, notwithstanding, to sue out a *scire facias*. And as a *scire facias* for the land must issue against the ter-tenant, whoever he may be, it will be also necessary to sue out another *scire*

(*a*) *Rex v. Harris*, *Ld. Raym.* 482; *Molineux v. Fulgam*, *Palm.* 289; *Ratcliff v. Tate*, 1 *Keb.* 776; *Loveless v. Ratcliff*, 1 *Keb.* 785; *Devereux v. Underhill*, 2 *Keb.* 245; *Fortune v. Johnson*, *Styl.* 318; *Pierson v. Tavenor*, 1 *Roll. Rep.* 353; *Davies d. Povey v. Doe*, *Blk.* 392; *Anon.* 2 *Brown*, 253; *Kingsdale v. Mann.* 6 *Mod.* 27; *S. C.* *Salk.* 321; *Goodright v. Hart*,

Stran. 830.

(*b*) *Doe d. Pate v. Roe*, 1 *Taunt.* 55; *Doe d. Thompson v. Mirehouse*, 2 *Dow. P. C.* 200; *Doe d. Lloyd v. Roe*, 2 *Dow. N. S.* 407.

(*c*) *Withers v. Harris*, *Ld. Raym.* 806; *Appendix*, No. 42.

(*d*) *Per Holt*, *C. J.* *Withers v. Harris*, *Ld. Raym.* 806; *sed vide* *Proctor v. Johnson*, 2 *Salk.* 600; *S. C. Ld. Raym.* 669.

facias for the costs against the personal representative, unless he be himself the *ter-tenant* (a).

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife, for the costs (a).

If the lessor of the plaintiff die after the *teste* of the writ, but before it is actually sued out, it is not necessary to revive the judgment by *scire facias*; and as he is not a party on the record, it seems no *scire facias* would be necessary, if he died before the *teste* of the *habere facias possessionem*, although the case of *Doe d. Beyer v. Roe* (b), has certainly left this point somewhat doubtful.

When the sheriff delivers possession of the land under the writ of *habere facias possessionem*, he thereby also delivers possession of the crops upon it; and such crops will pass to the lessor, although severed at the time of the execution of the writ, provided such severance has been made subsequently to the determination of the tenant's interest, and of the day of the demise in the declaration (c). And the growing crops will also pass to the lessor by the execution of the writ of possession, although previously seised under a *feri facias* against the tenant, if the day of the demise be prior to the issuing of such *feri facias*, inasmuch as they cannot be said to belong to the tenant, who is a trespasser from that day (d).

(a) *Doe d. Taggart v. Butcher*,
3 M. & S. 557.

(b) *Burr.* 1970.

(c) *Doe d. Upton v. Witherwick*,

3 Bing. 11.

(d) *Hodgson v. Gascoigne*, 5 B.
& A. 88.

Where the landlord after a recovery in ejectment distrained on the tenant for rent which became due after the verdict, and which the tenant paid, the Court refused to stay the execution, saying that the tenant ought to have disputed the distress (*a*).

OF THE WRIT OF ERROR.

A writ of error in ejectment cannot be brought in the name of the casual ejector (*b*), and consequently it will not lie until after verdict; for, before appearance, the casual ejector is the only defendant in the suit, and, after appearance, the new defendant is bound by the terms of the consent rule to plead the general issue (*c*). If also the defendant refuse at the trial to confess, &c. he will be precluded from bringing error, because the plaintiff will then be nonsuited as to him, and the judgment will be entered against the casual ejector (*c*).

When indeed the landlord defends alone, and the verdict is found against him, error may be brought, notwithstanding that the judgment, upon which the execution issues, is entered against the casual ejector (*c*): for a judgment is also in existence against the landlord, and upon that judgment, the writ of error may be taken out in the landlord's name. To enable him, however, to proceed with the writ of error, he must, it seems, obtain a rule to stay the plaintiff from taking out execution against the casual ejector; and if he omit to do this, and suffer a regular execution to take place, the Court will not, on a subsequent motion, order the execution to be set aside (*d*).

(*a*) *Doe d. Holmes v. Davies*, 2 7 Dow. P. C. 916.
Moore, 581.

(*c*) *Ante*, 223.

(*b*) *Roe d. Humphreys v. Doe*,
Barn. 181; *Doe d. Faithful v. Roe*,

(*d*) *George d. Bradley v. Wisdom*,
Burr. 756.

By statutes 16 and 17 Car. II. c. 8, s. 3 and 4, it is enacted, that no execution shall be staid by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or on a nonsuit, or discontinuance had; and, in case of affirmance, discontinuance, or nonsuit, the Court may issue a writ to inquire, as well of the mesne profits, as of the damages by any waste committed after the first judgment; and are upon the return thereof to give judgment, and award execution for the same, and also for costs of suit.

The words of this statute seem to render it necessary for the plaintiff in error to be *personally* bound; but by a reasonable construction, it is held sufficient, if he procure proper sureties to enter into the recognizance of bail, for otherwise lessors residing in distant counties would sustain great inconvenience, and an infant lessor, or a lessor becoming a *feme covert* after action brought, would be entirely excluded from the benefit of the act (*a*). But, although the sureties may be examined as to their sufficiency, the plaintiff in error cannot, and therefore where the lessor of the plaintiff swore, that the defendant was insolvent, and also that he (the lessor) had a mortgage upon the land for more than it was worth, the Court still held, that the defendant's recognizance was sufficient to entitle him to his writ of error.

The plaintiff in error is not bound to give the defendant in error notice of his entering into the recognizance pursuant to stat. 16 and 17 Car. II. c. 8, s. 3 (*b*); and by a recent rule (*c*)

(*a*) Barnes *v.* Bulmer, Carth. 121; Lushington *d.* Godfrey *v.* Dose, 7 Mod. 304; Keene *d.* Lord Byron *v.* Deardon, 8 East, 298.

(*b*) Doe *d.* Webb *v.* Goundry, 7 Taunt. 427.

(*c*) Reg. Gen. Hil. Term, 2 W. 4.

the sum in which the recognizance is to be taken under this statute, is double the yearly value of the premises in dispute, and double the costs of the ejectment (*a*).

The writ of error does not operate as a stay of execution until bail is put in, which cannot be done until the plaintiff's lessor has taxed his costs, for until costs are taxed, the amount of the penalty of the recognizance of the bail in error cannot be fixed; and if the lessor choose to waive his taxation of costs, and proceed for his possession only, the Court will not interfere to prevent him, notwithstanding the allowance of the writ of error (*b*).

Where the tenants in possession, having undertaken to appear on the usual terms, and also to take short notice of trial, made no defence at the trial, but sued out a writ of error, when the judgment was signed; the Court, on motion, allowed the lessor to take his judgment and execution against the casual ejector, notwithstanding the pendency of the writ of error (*c*).

In the case of *Wharod v. Smart* (*d*), the defendant brought a writ of error in Parliament, and the Court compelled him to enter into a rule "not to commit waste, or destruction, during the pendency of the writ of error."

When the plaintiff's lessor proceeds against the bail by action on the recognizances, they are not chargeable with the mesne profits under stat. 16 and 17 Car. II. c. 1, s. 4, unless their amount has been first ascertained by writ of inquiry pursuant to the provisions therein contained (*e*).

(*a*) *Thomas v. Goodtitle*, Burr. 2501; *Keene d. Lord Byron v. Deardon*, 8 East, 298.

(*b*) *Doe d. Messiter v. Dinely*, 4 Taunt. 289.

(*c*) *Doe d. Morgan v. Roe*, 3 Bing. 169.

(*d*) Burr. 1823.

(*e*) *Doe v. Reynolds*, 1 M. & S. 247.

After a recovery in ejectment, the lessor of the plaintiff may peaceably enter, pending a writ of error, if he find the premises vacant; but he cannot enter by force, nor take out a writ of execution (a).

OF BRINGING A SECOND EJECTMENT.

We have now traced the proceedings in this action, from the commencement to the conclusion; and it only remains to add a few remarks respecting the bringing of a new, or second ejectment.

It has already been observed, that a judgment in ejectment confers no title upon the party in whose favour it is given; it is manifest, therefore, that the judgment can never be final; and that it is always in the power of the party failing, whether claimant, or defendant, to bring a new action. The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment: for the plaintiff in the suit is only a fictitious person, and as the demise, term, &c., may be laid many different ways, it cannot be made appear that the second ejectment is brought upon the same title as the first.

It is said by Mr. Serjeant Sellon,^e in his Practice of the Courts (b), “that it has sometimes been attempted in Chancery, after three or four ejectments by a *bill of peace* to establish the prevailing party’s title; yet it hath always been denied, for every *termor* may have an ejectment, and every ejectment supposes a new demise, and the *costs* in ejectment are a recompence for the trouble and expense to which the possessor is put. But that where the suit begins in Chancery for relief touching pretended incumbrances on the title of

(a) *Badger v. Floyd*, 12 Mod. 398; *Recog. in Withers v. Harris*,
 (b) 2 Sell. Prac. 144.

Ld. Raym. 806, 8.

lands, and the Court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the Court, the Court hath ordered a *perpetual injunction* against the defendant, because there the suit is first attached in that Court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the Court to relieve against it." It should seem however from the cases of *Barefoot v. Fry* (a), and *Leighton v. Leighton* (b), that Courts of equity will sometimes interfere, and grant perpetual injunctions, when the ejectments have been commenced in the usual way at the common law (c). And in one case, where upon a most vexatious prosecution of ejectments, the Court of Chancery refused to grant a perpetual injunction, upon an appeal to the House of Lords, the injunction was allowed (d).

(a) Bunb. 138.

Price, 417.

(b) 1 P. Wms. 671.

(d) *Earl of Bath v. Sherwin, Bro.*(c) *Deardon v. Lord Byron*, 8

Cas. Parl. 270.

CHAPTER XI.

Of staying the Proceedings in the Action of Ejectment.

THE discretionary power exercised by the Courts in the regulation of ejectments, is frequently called forth by applications from the defendant, to stay the proceedings in the action; and a separate consideration of the cases in which these applications have been granted, seems preferable to intermixing them with the detail of the regular practice.

When the ejectment is brought on the forfeiture of a lease, the proceedings will be stayed upon the application of the tenant until the lessor of the plaintiff has delivered particulars of the breaches of covenant, on which he intends to rely; and a summons for this purpose will be granted before the tenant has appeared to the action, or entered into the consent rule (*a*).

When the lessor of the plaintiff is an infant, the Court will stay the proceedings until security be given for the costs, unless a responsible person has been made the plaintiff in the suit, or the father, or guardian undertake to pay them; but an inquiry as to these facts should be made previously to the application (*b*). The proceedings will also be stayed until security be given for the costs, when the lessor resides abroad (*c*); and, in a case where an ejectment was brought upon the demise of a person resident in Ireland, the Court of King's Bench stayed

(*a*) Doe d. Birch v. Phillips, 6 T. R. 597.

(*b*) Noke v. Windham, Stran. 694; Throgmorton d. Miller v. Smith, Stran. 932; Anon. 1 Wils.

130; Anon. 1 Cowp. 128; Doe d. Roberts v. Roberts, 6 Dow. P. C. 556; Appendix, No. 43.

(*c*) B. N. P. 111; Appendix, No. 44.

the proceedings until security should be given for the costs, although it was an ejectment, brought under the direction of the Court of Chancery, where the bill was retained until after the trial of the ejectment, and security had already been given there to the amount of 40*l.* (*a*) And when the lessor is unknown to the defendant, the latter may demand an account of his residence, or place of abode, from the lessor's attorney, and if he refuse to give it, or give a fictitious account of a person who cannot be found, proceedings will be stayed until security for the costs be given (*b*). But these are the utmost limits to which the Courts will go in granting rules of this nature; and an application has been refused, founded on the poverty of the lessor (*c*); so also one in which an ejectment had previously been brought in another Court and abandoned, and which the lessor had been obliged to give security, because his residence was then unknown (*d*). So also, one in which the lessor was an uncertificated bankrupt, and in which the assignees having declined to proceed with the action, it was carried on for the bankrupt's benefit (*e*). And it has been holden, that the death of the lessor after verdict and pending a rule for a new trial is not a sufficient ground for an application of this nature, where the lessor claimed in fee (*f*), though where he claimed only as tenant for life, the Court required security to be given (*g*).

The practice of granting these rules originated in the Court of King's Bench, and were indeed at first entirely confined to cases of infant lessors (*h*).

(*a*) *Denn d. Lucas v. Fulford*, Burr. 1177.

(*b*) *Tidd's Prac.* 476, 7.

(*c*) *Goodright d. Jones v. Thrustout*, Cas. Pr. C. P. 15.

(*d*) *Doe d. Selby v. Alston*, 1 T. R. 491.

(*e*) *Doe d. Colnagni v. Blick*, 7

Scott, 714.

(*f*) *Doe d. Cozens v. Cozens*, 9 Dow. P. C. 140.

(*g*) *Thrustout d. Turner v. Grey*, Stran. 1056.

(*h*) *Thrustout d. Dunham v. Percival*, Barn. 183.

The proper time to take out a summons, or move the Court for this rule, is after plea pleaded (*a*).

The next case, in which the Courts interfere to stay the proceedings, is when the costs of a prior ejectment upon the same title, or between the same parties, are left unpaid (*b*).

For some time after the introduction of this practice, the Court would not interfere unless the two ejectments were brought in the same Court (*c*); but this limitation no longer prevails, and it is now immaterial in what Court the first ejectment is brought (*d*). Formerly also there was a diversity of opinion, whether the proceedings could be stayed, where the two ejectments were brought (without fraud or collusion) upon different demises although upon the same title (*e*); but it is now of no consequence whether the two ejectments are brought upon the demise of the same or different persons, against all or some of the same parties, or for the same or different premises, provided they are brought upon the same title, and for the recovery of part of the same estate. Thus, proceedings have been stayed where one of the lessors in the first action died before the commencement of the second; where in the second ejectment two trustees were added to the lessors; where part of the lands were occupied by new tenants; where the second action was between the heir of the plaintiff's lessor, and the heir of the defendant in the first action; where the two actions were between the devisees of the respective parties (*f*); where one of the lessors released his claim to

(*a*) 2 Sell. Prac. 139.

(*b*) Append. No. 45.

(*c*) Austine *v.* Hood, 1 Sid. 279;
Thredway *v.* Harbert, Comb. 106.

(*d*) Doe d. Hamilton *v.* Atherly,
7 Mod. 420; Anon. 1 Salk. 255;
Holdfast d. Hattersley *v.* Jackson,
Barn. 133; Doe d. Chadwick *v.*

Law, Blk. 1158; Doe d. Walker *v.*
Stephenson, 3 B. & P. 22.

(*e*) Short *v.* King, Stran. 681;
Tredway *v.* Harbert, Comb. 106.

(*f*) Doe d. Hamilton *v.* Hatherly,
Stran. 1152; Thrustout d. Wil-
liams *v.* Holdfast, 6 T. R. 223;
Keene d. Angel *v.* Angel, 6 T. R.

the defendants after the first action on a money consideration, and a covenant on their parts to suspend against him their claim for costs, and the second ejectment was brought by the heir of the other claimant (*a*); where the second action was brought by the assignees of an insolvent debtor, the costs of the first ejectment having been inserted as a debt in the insolvent's schedule (*b*); and where the second ejectment was brought by the lessee of an insolvent who had been the lessor in the first action, and it appeared that the assignment was fraudulent to evade the payment of the costs (*c*).

A distinction was also formerly taken as to the situation of the parties in the different actions, and it was holden, that if the defendant in the second ejectment had been the claimant in the first, the proceedings should not be stayed (*d*): but this doctrine is now also exploded, and the change of situation in the parties is immaterial (*e*). The rule will also be granted, whether the merits be decided in the former action, or whether there be a judgment of nonsuit, or of *non-pros*, or even if the first action be discontinued before the consent rule, or plea (*f*): nor is the length of time which elapses between the two actions any bar to the rule (*g*).

The Courts will likewise stay the proceedings in a second ejectment until the costs of a former one be paid, if the conduct of the party has been vexatious or oppressive, although he is not liable to the costs of the first action. Thus, where the

740; Doe d. Feldon v. Roe, 8 T. R. 1180.

645; Doe d. Thomas v. Shadwell, (*d*) Roberts v. Cook, 4 Mod. 379.

7 Dow. P. C. 527; Doe d. Mudd (*e*) Thrustout d. Williams v. v. Roe, 8 Dow. P. C. 444. Holdfast, 6 T. R. 223.

(*a*) Doe d. Rees v. Thomas and (*f*) Doe d. Langdon v. Langdon, Another, 4 Ad. & Ell. 348. 5 B. & Ad. 864.

(*b*) Doe d. Standish v. Roe, 5 B. & Ad. 878; Doe d. Heighley v. (*g*) Dence v. Doble, Comb, 110; Harland, 10 Ad. & Ell. 761. Keene d. Angel v. Angel, 6 T. R. 740; Anon. Salk. 255.

(*c*) Doe d. Chadwick v. Law, Blk.

lessor in the second action was also the lessor in the first, and had refused, after the appearance of the defendant in such first action, to enter into the consent rule, whereby, although nonsuited for want of a replication, he was exempted from the costs of the defendant's appearance, the Court would not let him proceed until he had satisfied the defendant for the expenses of such first appearance (*a*). And, upon the same principle, where the first ejectment was on the demise of the husband and wife, but the husband alone entered into the consent rule, and judgment given in the Common Pleas for the defendant, was affirmed in the King's Bench and the House of Lords, and after the death of the husband, the wife brought a second ejectment on her own demise; the Court would not suffer her to proceed until the costs of the first ejectment were paid, saying, "We are not going to compel the lessor to pay the costs, but only to prevent her being vexatious (*b*)."¹ But where in the first action the defendant had obtained judgment as in case of a nonsuit (the lessor of the plaintiff having withdrawn his record after a peremptory undertaking) and the defendant in the second action (being the heir of the defendant in the first) was not intitled to the costs of that action, the Court refused to stay the proceedings until such costs were paid, on the ground that the merits not having been tried, and the defendant having no interest in the costs, he could not complain of vexation, nor bring himself within the principle of the adjudged cases (*c*).²

In a case, in which claimants under very peculiar circumstances had brought three actions, in three different Terms, in the Court of King's Bench, for the same property, and all three were pending together, and the parties had not proceeded to trial in either, but several orders had been made in the first cause, and the defendants had obtained a rule calling

(*a*) *Smith d. Ginger v. Barnardiston*, Blk. 904; *ante*, 230. Stran. 1152.

(*b*) *Doe d. Hamilton v. Hatherly*, 2 Dow. N. S. 26.

(*c*) *Doe d. Blackburn v. Standish*,

upon the plaintiff to show cause why they should not elect to proceed in one action only, and in case they should elect to proceed in either of the two last actions, why the first action should not be discontinued, and the costs paid by the claimants; and thereupon an improvident rule was agreed to, by which the proceedings in the two last actions were stayed, and the claimants were to proceed to trial in the first action under great disadvantages as to costs, and instead of proceeding with that action, they brought a new ejectment in the Court of Common Pleas, that Court upon motion stayed the proceedings therein (*a*).

Where the claimant obtained possession of the disputed premises, as upon a vacant possession, after having brought several unsuccessful actions, the Court set aside the judgment and execution, and directed proceedings to be staid until security should be given for costs (*b*).

It was once holden, that the proceedings in a second ejectment ought *not in any case* to be stayed for non-payment of the costs in the first action, if costs were not of right payable to the party applying (*c*); and that it was *in all cases* necessary to show, that the party against whom the application was made, had acted vexatiously, or oppressively, before the rule could be obtained. But these maxims have long given place to more just and equitable principles (*d*).

The Court has also ordered the proceedings in a second ejectment to be stayed until the costs of an action for mesne profits (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of

(*a*) Doe d. Carthew v. Brenton, 6 Bing. 469.

(*b*) Harvey d. Beal v. Baker, 2 Dow. N. S. 75.

(*c*) Thrustout d. Parke v. Troublesome, Stran. 1099; S. C. And. 297.

(*d*) Short v. King, Stran. 681.

error) as well as the costs of the first ejectment, were paid (*a*). But the Court will not extend the rule to include the damages recovered in such action for the mesne profits, however vexatious the proceedings of the party may have been (*b*).

The Courts will not stay the proceedings in the second action, where the party, against whom the application is made, is already in custody under an attachment for non-payment of the costs of the first action (*b*), nor will they include the taxed costs of a suit in equity, brought by the same party for the same property in the rule (*c*): nor will they stay the proceedings, if it clearly appear that the verdict in the first action was obtained by fraud and perjury (*d*): nor will they in any case in which they stay the proceedings further interfere, so as to compel the claimant to pay the costs by a particular day, or permit the defendant to *non-pros* the action (*e*).

It is sufficient for the lessor to swear generally in answer to an application of this nature, that his claim is not founded on the same title as was previously litigated, without disclosing the particulars of the title under which he does claim (*f*).

There is no particular stage of the proceedings in which it is necessary to move for this rule. It will be granted even before the defendant has appeared: and it always should be moved for as early in the action as it conveniently can be (*g*). Where, however, satisfactory reasons were given why the application was not made at an earlier stage, the Court stayed

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| (<i>a</i>) Doe d. Pinckard v. Roe, 4 East, 585. | & C. 622. |
| (<i>b</i>) Doe d. Church v. Barclay, 15 East, 833. | (<i>e</i>) Doe d. Sutton v. Ridgway, 5 B. & A. 523. |
| (<i>c</i>) Doe d. Williams v. Winch, 3 B. & A. 602. | (<i>f</i>) Doe d. Bailey v. Bennett, 9 Dow. P. C. 1012. |
| (<i>d</i>) Doe d. Rees v. Thomas, 2 B. | (<i>g</i>) Doe d. Mudd v. Roe, 8 Dow. P. C. 444. |

the proceedings after notice of trial, and the lessor had been at the expense of bringing his witnesses to the place of trial (*a*). The reasons assigned were, that the cause was so clear at the last trial, and the parties had delayed so long commencing their second action (four years), that the defendants did not think them in earnest until notice of trial was given, and that the defendant then proceeded to tax his costs, in order to ground the application, which otherwise he would not have done, the lessor of the plaintiff being insolvent.

The Courts will also stay proceedings when the lessor has two actions depending, at the same time, for the same premises, in the same or different Courts; and the proceedings in the one action will then be stayed, until the other action is determined (*b*). And in a case where the claimant brought thirty-seven separate ejectments for thirty-seven different houses, all of which depended on the same title, the Court said it was a scandalous proceeding, stayed the proceedings in thirty-six of them, and made a rule that they should abide the event of the thirty-seventh (*c*).

When the party, against whom a verdict in ejectment has been obtained, brings a writ of error, and pending that writ commences a second ejectment, the Court will order the proceedings in the second action to be stayed until the writ of error is determined; and it seems also, that if it do not appear to the Court, that the writ of error was brought with some other view than to keep off the payment of costs, proceedings will be stayed until the costs of the first action are paid, notwithstanding such costs are suspended by the writ of error (*d*).

(*a*) Doe v. Law, Blk. 1158.

(*c*) 2 Sell. Prac. 144; *ante*, 264.

(*b*) Thrustout d. Park v. Troublesome, And. 297; S. C. Stran. 1099; Doe d. Carthew v. Brenton, 6 Bing. 469.

(*d*) Fenwick v. Grosvenor, 1 Salk. 228; Grumble v. Bodily, Stran. 554.

By the statute 7 Geo. II. c. 20, s. 1, it is enacted, "that when an ejectment is brought by a mortgagee, his heirs, &c. for the recovery of the possession of the mortgaged premises, and no suit is depending in any Court of equity, for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem, having been made the defendant in the action, shall at any time, pending the suit, pay to the mortgagee, or in case of his refusal, bring into Court, all the principal monies, and interest due on the mortgage, and also costs to be computed by the Court, or proper officer appointed for that purpose; the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly." By the third section, the act is not to extend to any case where the person, against whom the redemption is prayed, shall insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, or are admitted by the other side, nor to any case where the right of redemption in any cause, or suit, shall be controverted or questioned, by or between different defendants in the same cause or suit.

An application for a rule to stay proceedings under this statute (a), must of course be made before execution executed, and must be accompanied by an affidavit that no suit in equity is depending. The party must also appear to the action before the application is made, for the Courts have no power to interfere under the statute until after appearance (b); and this fact must appear in the affidavit, but it is sufficient to swear that the party "has entered the usual appearance," without proceeding to state that he has entered into the consent rule (c).

(a) Append. No. 46.

(c) Doe d. Coxe v. Brown, 6 Dow

(b) Doe d. Hurst v. Clifton, 4 P. C. 471.
Ad. & Ell. 814.

In a case where the premises were in possession of a tenant of the mortgagor, who neglected to appear, in consequence of which the mortgagee recovered possession under a judgment by default, the Court would have set the judgment and execution aside, in order to let the mortgagor in as defendant, and so place him in a condition to apply for a stay of proceedings, if the mortgagee had not consented to take what was due upon the mortgage, and restore possession (a).

In a case where a mortgagee left his property to executors, and his will was disputed, but by the sentence of the Prerogative Court established, and letters testamentary granted; after which grant the heir appealed to the Court of Delegates, pending which appeal the executors assigned the mortgage to the lessor, who also pending the appeal, brought an ejectment against the mortgagor, to which ejectment the mortgagor did not appear, but suffered judgment to go by default against the casual ejector. Upon an application by the mortgagor to stay execution until the determination of the appeal, upon the ground, that the title of the lessor would be invalidated, provided the appeal were given in favour of the heir, and that the defendant might then perhaps be compelled to pay the mortgage-money twice, the Court ordered the execution to be stayed until the appeal should be determined, upon the defendant vesting the mortgage-money, interest, and costs, in Exchequer bills, and depositing them with the signer of writs (b)."

A rule upon this statute has been granted after an agreement, on the part of the mortgagor, to convey the equity of redemption to the mortgagee, where no tender of a deed of

(a) Doe d. Tubb v. Roe, 4 Taunt. 887.

(b) Doe d. Mayhew v. Erlam, MS. M. T. 1811. The Court did not in this case advert to the cir-

cumstances that the mortgagor, who made the application, had not appeared to the action; *vide* Doe d. Hurst v. Clifton, 4 Ad. & Ell. 814.

conveyance for execution had been made to the defendant, or bill in equity filed (*a*); but where it appeared that, subsequently to the defendant's agreement, several applications had been made to him, but without effect, to complete the purchase, the Court refused to stay the proceedings (*b*).

In a case where, upon an application by the mortgagor to stay proceedings under this statute, it appeared that he had also taken up money from the mortgagee upon his bond, the Court granted the rule upon the payment of the mortgage and interest only, the bond debt not being a lien upon the lands; but it seems that when in such case *the heir* is bound by the bond, and the mortgagor dies, the heir must discharge the bond debt, as well as the mortgage (*c*). Where, however, the bond was *a lien on the estate*, and the mortgagee had given notice to the mortgagor, that he should insist upon payment of the money due upon it, the Court refused to stay the proceedings, upon payment of the mortgage-money only (*d*). Where also other mortgages, although upon different premises, existed between the defendant and the claimant, the Court would not stay proceedings under this statute, upon the payment of the sum due upon one of the mortgages only (*e*).

If upon a motion of this nature, any doubt exist as to the amount due, the Courts will refer the case to the proper officer: and in a case where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises (the ejectment being brought for the resi-

(*a*) *Skinner v. Stacey*, 1 Wils. 80.

(*b*) *Goodtitle d. Taysum v. Pope*, 7 T. R. 185.

(*c*) *Bingham d. Lane v. Gregg*, Barn. 182; *Archer d. Hankey v. Snapp*, And. 341; *S. C. Stran.* 1107, *and the cases there cited*.

(*d*) *Felton v. Ash*, Barn. 177.

(*e*) *Roe d. Kaye v. Soley*, Blk.

726. It does not appear from the report of this case, that the other mortgaged premises were included in the ejectment; but it is difficult to reconcile the decision either to the letter or spirit of the statute, unless they were also contained in the declaration.

due, and it was prayed, that the officer might be directed to make allowance for such repairs; the Court said, that the rule must follow the words of the statute, and that the officer would make just allowances and deductions (*a*). If, however, after taxation, the debt and costs are not paid, the lessor must proceed in the suit, and cannot have an attachment (*b*).

Upon staying proceedings under this statute, the costs are to be taxed in the ordinary way, and not as between attorney and client (*c*).

The cases in which the Courts have stayed the proceedings under stat. 4 Geo. II. c. 28, have already been considered (*d*).

The Court would not stay proceedings in an action brought by the provisional assignee of the Insolvent Debtors' Court, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to stat. 1 Geo. IV. c. 119, s. 11, the authority of the Insolvent Debtors' Court to proceed (*e*).

(*a*) *Goodright v. Moore*, Barn. 176.

(*b*) *Hand v. Dinely*, Stran. 1220.

(*c*) *Doe d. Capps v. Capps*, 3 Bing. N. C. 768.

(*d*) *Ante*, 120, &c. ; Append, No. 47.

(*e*) *Doe d. Spencer v. Clarke*, 3 Bing. 370.

CHAPTER XII.

Of the Statutes 1 Geo. IV. c. 87, and 1 Wm. IV. c. 70.

THE protracted period during which dishonest or insolvent tenants are enabled, by the ordinary course of law, to retain possession of their farms after the determination of their interest, has long been productive of serious evils to landlords. Unless a tenancy expires at Christmas, upwards of six months must, and frequently eight or nine months will, elapse, before final judgment and execution can be obtained; during which period the tenant has the uncontrolled power of suffering the land to remain uncultivated, or of committing wilful destruction, as temper or immediate interests may prompt. The provisions of the stat. 4 Geo. II. c. 28, giving double the yearly value of the lands held over, affords no efficient relief in cases of this description. These frauds are not committed by respectable or responsible tenants; and when the tenant is insolvent or dishonest, the judgment of the Insolvent Debtors' Court gives but an unsubstantial remedy for the injury which the landlord has sustained.

To mitigate these evils, the beneficial statutes now under consideration have been passed, and the general effect of them is as follows. They enable the landlord, when the tenant *holds under an agreement in writing*, to compel him before he is admitted to defend, to give security for the damages and costs of the action, and that he will relinquish possession within four days after the trial, unless he shall, within that time, give further security that he will not commit waste, or otherwise injure the land, before the ordinary time of obtaining judgment or execution. And they also enable the landlord in all

cases, *whether the holding has been in writing or by parol*, to bring his cause to trial at the assizes next following the expiration of the tenancy, unfettered by the machinery of terms and returns; as likewise to recover the mesne profits as well as the land itself in the ejectment, and to obtain possession immediately after the trial, if the Judge shall certify his opinion on the record that he ought to do so.

STAT. 4 GEO. I. C. 87

This statute, after reciting the losses to which landlords were exposed by the law as it then stood, enacts, that where the term or interest of any tenant, holding *under a lease or agreement in writing* has expired or been determined, and such tenant, or any one claiming under him, shall refuse to deliver up possession, after demand in writing signed by the landlord or his agent, and served personally upon him, or left at his usual place of abode, and the landlord shall thereupon bring an ejectment, such landlord may, at the foot of the declaration, address a notice to the tenant, requiring him to appear on the first day of the following Term, to be made defendant, and to find such bail as may be ordered by the Court under the provisions of the statute; and upon his appearance, or in case of non-appearance, on the usual affidavit of service, and the production of the lease or agreement, or some counterpart or duplicate, and proof of its execution by affidavit, and also upon affidavit that the premises have been actually enjoyed under the lease or agreement, and that the interest of the tenant has ceased, and that possession has been lawfully demanded, the landlord may move the Court for a rule to shew cause why the tenant, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, shall not undertake, in case a verdict pass for the plaintiff, to give him judgment of the Term next preceding the time of trial, and also enter into a recognizance, with two sufficient sureties, in a reasonable sum, to pay costs and damages; and in case

the party shall neglect or refuse to perform such conditions as shall be ordered by the Court upon shewing cause against this rule, or on an affidavit of service of such order, when no cause is shown, an absolute rule shall be made for entering up judgment for the plaintiff.

By section 2, it is further enacted, that whenever it shall appear on the trial of any ejectment between landlord and tenant, that the tenant hath been served with due notice of trial, "the production of the consent rule shall be sufficient evidence of lease, entry, and ouster; and the Judge before whom such cause shall come on to be tried, whether the defendant shall appear upon such trial or not, shall permit the plaintiff after proof of his right to recover possession of the premises, to go into evidence of the mesne profits accruing from the determination of the tenant's interest, down to the time of the verdict, or to some preceding day to be specially mentioned therein; and the jury, finding for the plaintiff, are to give their verdict upon the whole matter, both as to the recovery of the premises, and also as to the amount of the damages to be paid for mesne profits; but the above proceedings are not to bar the landlord from proceeding by action of trespass for the recovery of the mesne profits accruing from the verdict, or the day so specified therein, down to the day of obtaining possession."

By the 3rd section, the Judge is empowered, in case it shall appear to him "that the finding of the jury was contrary to the evidence, or that the damages given were excessive, to order the execution to be stayed absolutely till the fifth day of the next term, and is in all cases compelled to make such order upon the requisition of the defendant, in case he shall forthwith undertake to find, and within four days from the day of the trial, shall actually find two sufficient sureties, in such sum as the Judge shall direct, not to commit waste, or other wilful damage, and not to sell or carry off any standing crops, hay,

&c., from the day of the verdict to the day of execution; but such recognizance to stand discharged in case a writ of error shall be brought, and security given under statute 16 & 17 Car. II., and (as regards Ireland) statute 17 & 18 Car. II."

The 4th section provides, "that the recognizances and securities shall be taken in the same manner, and by the same persons as recognizances of bail; that a fee of two shillings and sixpence only shall be paid for filing them, and that no proceeding shall be taken upon them after the expiration of six months from the time when the landlord shall have obtained actual possession of the premises."

The 6th section relates only to the Welsh jurisdiction now abolished (*a*); and by the 7th, 8th, and 9th sections, Scotland is exempted from the operation of the act, all other remedies of landlords are retained, and double costs are given to the defendant if he obtain a verdict, or the plaintiff be nonsuited on the merits.

This statute is only applicable to cases in which the relationship of landlord and tenant is clear, and its provisions will not be enforced if there is any dispute as to the title, as, for example, where the tenant made affidavit that he claimed to hold as heir-at-law (*b*). With respect to leases also it only applies to cases, where the lease or term has expired by efflux of time, and not to tenancies determined by a surrender by the tenant of his term (*c*), or by a notice either from or to the landlord, where there is a subsisting lease for a term of years, determinable at the end of a certain number of them, and so determined by a notice under the lease (*d*).

A tenancy by virtue of an agreement in writing, for *three*

(*a*) Stat. 1 Wm. IV. c. 70.

& Ad. 922.

(*b*) Doe d. Sanders v. Roe, 1 Dow. P. C. 4.

(*d*) Doe d. Lord Cardigan v. Roe, K. B. T. T. 3 Geo. 4, MS.; S. C.

(*c*) Doe d. Tindal v. Roe, 2 B.

1 D. & R. 540.

months certain, is a tenancy within the meaning of this statute, because it is a tenancy "for a term certain" (a); but a tenancy for years *determinable on lives* is not, because it is not a holding for "a number of years certain" (b). So likewise a holding from year to year under a written agreement is within the statute, although a holding by parol from year to year is not: the words *in writing* extending to the whole sentence, and not being confined to holdings for a term, or number of years certain (c).

The notice at the foot of the declaration required by this statute, should be signed by the landlord, or his attorney or agent (d), and should be in addition to, and not form part of, the ordinary notice signed by the casual ejector (e). It must require the tenant, in the terms of the statute, to appear in Court "on the first day of the Term" next following, and a notice "to appear according to the statute in the next following Term," will not be sufficient. (f). But it need not specify in detail the purposes for which it is given. A notice calling upon the tenant to appear, &c., "and to find such bail, if ordered by the Court, and for such purposes as are specified by the statute," will suffice (d), and the Court will mould the rule conformably to the statute on shewing cause (g).

It should form part of the rule that the landlord shall be at liberty to sign judgment against the casual ejector in case of default on the part of the tenant to give the required securities (h).

The affidavit in support of the application must have the

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| (a) Doe d. Phillips v. Roe, 5 B. & A. 766. | d. Gildart v. Roe, 1 W. W. & H. 346. |
| (b) Doe d. Pemberton v. Roe, 7 B. & C. 2. | (e) Anon. 1 D. & R. 435; Doe d. Sampson v. Roe, 6 B. Moore, 54. |
| (c) Doe d. Earl of Bradford v. Roe, 5 B. & A. 770. | (f) Doe d. Holder v. Rushworth, 4 M. & W. 75. |
| (d) Doe d. Beard v. Roe, 1 M. & W. 360; but an affidavit verifying the agency is not necessary; Doe | (g) Doe d. Phillips v. Roe, 5 B. & A. 766. |
| | (h) Doe v. Roe, 2 Dow. P. C. 180. |

names of the plaintiff's lessor set out at full length; and if there be more than one lessor, the Christian and surnames of all the lessors must be set forth (*a*); but if the objection be not taken at the time, the Court will not, in a subsequent stage of the cause, set aside the proceedings for irregularity (*b*).

It must also contain a positive averment of the execution of the lease or agreement by the tenant (*c*), and that the tenancy has either expired by the efflux of time, or been determined by a regular notice to quit (*d*).

The original lease or agreement, or a counterpart or duplicate must be produced, when the rule *nisi* is moved for, and such instrument must be at that time stamped. It is not sufficient to move on a copy of the instrument, or on an instrument stamped after the rule *nisi*, and before cause shewn (*e*).

The execution of the instrument by the defendant must also be proved, but the affidavit of the subscribing witness is not necessary. It may be proved *aliunde* (*f*), by any person present at the execution, or acquainted with the handwriting. And although in a case in the Court of Queen's Bench (*coram* Williams, J.,) an attorney who was a subscribing witness, and had subsequently become the attorney for the defendant, was compelled to make the affidavit, and to pay the costs of the application, the rule seems, from the report, to have been granted rather on the ground that the refusal of the attorney to make the affidavit was reprehensible, and a contempt of Court, than upon any real necessity for his testimony (*g*).

(*a*) Doe d. Watson *v.* Roe, 5 Dow. P. C. 389.

(*b*) Doe d. Anglesey *v.* Brown, 3 Dow. P. C. 230.

(*c*) Doe d. Beard *v.* Roe, 2 Gale, 131.

(*d*) Doe d. Topping *v.* Boast, 7 Dow. P. C. 487.

(*e*) Doe d. Caulfield *v.* Roe, 3 Bing. N. C. 329.

(*f*) Doe d. Gowland *v.* Roe, 6 Dow. P. C. 35; Doe d. Morgan *v.* Rotherham, 3 Dow. P. C. 690.

(*g*) Doe d. Avery *v.* Roe, 6 Dow. P. C. 518.

A demand of possession is sufficient notice to entitle the plaintiff to the benefit of the statute (*a*) ; and in a case where the tenant had absconded to America, a rule *nisi* was granted (service of the demand of possession on the premises to be deemed good service), in order to give the landlord the benefit of the statute (*b*).

The time within which the required bonds and security shall be given, is to be fixed by the Court at the time the rule is granted (*c*).

The Court will only direct recognizances to be entered into under this statute, on the appearance of the defendant, for the costs of the action, and not for the mesne profits (*d*). And in entitling the recognizance, the name of the tenant should be substituted for the nominal defendant (*e*) ; these recognizances also do not supersede the necessity of the two sureties required by stat. 16 & 17 Car. II. c. 8, in case the defendant should bring a Writ of Error (*f*).

If the tenant relies in answer to the application, upon a subsequent retaking of the premises, such retaking must be alleged with particularity and precision ; and when it was sworn by the tenant, that after the expiration of the tenancy, he retook the premises by parol, and that he rented and held them under such parol agreement at that time, and that he was advised there was a valid tenancy then existing, and that he had a good defence to the action, the Court of Common Pleas, notwithstanding, made the rule absolute, because the affidavit only deposed that he retook the premises, without

(*a*) Doe d. Anglesey v. Roe, 2 D. & R. 565.

(*b*) Doe d. Selgood v. Roe, 1 W. & H. 206.

(*c*) Doe d. Anglesey v. Brown, 2 D. & R. 688.

(*d*) Doe d. Sampson v. Roe, 6 B. Moore, 54.

(*e*) Roe d. Durant v. Moore, 6 Bing. 656.

(*f*) Roe d. Durant v. Moore, 7 Bing. 124.

stating for what period, or on what terms; and therefore, that in the absence of satisfactory evidence of a new taking, the case was within the act (a).

It is not necessary for the lessor of the plaintiff to prove the due service of notice of trial, in order to enable him to proceed for the mesne profits under this statute, in case the defendant does not appear, the Court of Queen's Bench being of opinion that the word "such" in the second clause, confines the enactment to "ejectments at the suit of a landlord against a tenant," but does not limit it to cases where notice of trial is proved (b).

STAT. 1 WM. IV. C. 70.

The 36th section of this statute, after reciting the delays suffered by landlords in recovering possession of their lands, enacts "that in all actions of ejectment where the tenancy shall expire, or the right of entry accrue to the landlord, in or after *Hilary* or *Trinity* Terms respectively, he may within ten days after the tenancy shall have expired, or right of entry accrued (c), serve a declaration in ejectment, entitled of the day next after the day of the demise in the declaration, whether the same shall be in Term or in Vacation (d), with a notice subscribed, requiring the tenants in possession to appear and plead, within ten days (e); and that proceedings are to be had on such declaration, and rules to plead entered and given, in the same manner, as nearly as may be, as if the declaration had been duly served before the preceding Term; and it then provides that judgment shall not be signed against the casual ejector until default of appearance and plea within the ten days, that there shall be given at least six clear days' notice of

(a) *Roe d. Durant v. Moore*, 6 Bing. 574.

(b) *Doe d. Thompson v. Hodgson*, 1 Q. B. Rep. 135.

(c) *Ante*, 208.

(d) *Ante*, 164.

(e) *Ante*, 184, 209.

trial before the commission day of the assizes at which such ejectment is intended to be tried, and that the defendant may apply in the ordinary manner to a Judge in Chambers for time to plead, or for staying or setting aside the proceedings, or for postponing the trial.

Section 37 enacts, "that in making up the record the declaration may be specially entitled of the day next after the day of the demise therein, whether such day shall be in Term or in Vacation, and no judgment shall be avoided or reversed by reason only of such special title" (a).

Section 38 empowers the Judge, before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and that upon such certificate a writ of possession may be issued forthwith (b), and the costs taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued; and the section contains a further provision that the writ, instead of reciting a recovery by judgment, shall recite shortly that the cause came on for trial at *nisi prius* at such a time and place and before such a Judge, (naming the time, place, and Judge), and that thereupon the said Judge certified his opinion that a writ of possession ought to issue immediately.

The word "assizes" in the 36th section has been construed not to extend to "sittings at *nisi prius*," and consequently the statute does not extend to cases in London and Middlesex (c). It is also with respect to country causes limited to cases in which the right of entry has accrued during Hilary, or Trinity Terms, or the Vacations following them (d).

(a) *Ante*, 207.

(b) Appendix, No. 37.

(c) Doe d. Norris v. Roe, 1 Dow. P. C. 547.

(d) Doe v. Roe, 1 Dow. P. C. 79, 304; Doe d. Somerville v. Roe, 4 Moore & S. 747.

An objection that the action was not commenced within ten days after the right of entry accrued, is matter of irregularity, and cannot be taken at *nisi prius* (a); and it is no ground for setting aside a verdict, that the plaintiff did not give six clear days' notice of trial, if the defendant appears and makes his defence (b).

Where a lease contained a proviso for re-entry in case of non-repair within three months after notice, and the landlord gave notice, and brought ejectment and proceeded to trial *before* the expiration of the three months, and at the trial an order of Court was made with consent of parties, that a juror should be withdrawn, and the premises repaired by the 24th of June then next, and default being made, the landlord brought a second ejectment on June 28th under this statute; it was held that the ejectment was properly so brought, for that the right of entry was suspended by virtue of the arrangement until the time for completing the repairs had passed by (a).

The provisions of the 38th section are not limited to ejectments between landlords and tenants, but extend to all ejectments; and the Judge has no other discretion given him by that section than that of granting a certificate for *immediate* possession, or refusing the certificate altogether (c). In the case of *Doe d. Parker v. Hilliard*, Park, J., granted the certificate in the usual form, upon the lessor's undertaking not to put the writ of possession in force, if the arrears of the annuity (which were the foundation of the action) were paid within a month (d).

Where the plaintiff is nonsuited for want of the appearance

(a) *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.

(b) *Doe d. Antrobus v. Jepson*, 3 B. & A. 402.

(c) *Doe d. Williamson v. Dawson*, 4 C. & P. 589.

(d) 5 C. & P. 132.

of the defendant, it is of course requisite that an affidavit of the circumstances should be laid before the Judge before he will grant the certificate (a).

Where an ejectment was brought on two demises, and a verdict was taken for the plaintiff on the first demise, with liberty for him to move to enter a verdict for him on the second demise, he is not precluded from doing so, by having obtained early execution on the verdict on the first demise, and possession being taken under it (b).

(a) Doe d. Williamson v. Dawson, 4 C. & P. 589.

Bank of England v. Chambers, 4 Ad. & Ell. 410.

(b) Doe d. Gov. & Comp. of the

CHAPTER XIII.

Of the Action for Mesne Profits.

ON the first introduction of the action of ejectment, and whilst the ancient practice prevailed, the measure of the damages were the profits of the land accruing during the *tortious* holding of the defendant; but when the proceedings became fictitious, and the plaintiff nominal, the damages assessed became nominal also; and no provisions have since been made by the Courts, either by engrafting additional conditions upon the consent rule (*a*), or by the invention of new fictions, to enable the jury in the action of ejectment to inquire into the actual damages, and include in their verdict the real injury sustained by the wrongful holding. The party has not, however, been left without redress; and the remedy provided is far more comprehensive and efficacious in its nature than could have been obtained by any adaptation to this object of the action of ejectment itself. The Courts have sanctioned an application of the common action of trespass *vi et armis* to the purposes of this remedy. It is generally termed *an action for mesne profits*, and the plaintiff complains in it of his ejection and loss of possession, states the time during which the defendant (the real party) held the land, or took the rents and profits, and prays judgment for the damages which he has thereby sustained.

This action is partly superseded, when the relation of landlord and tenant has subsisted between the parties to the ejectment, by the provisions of the stat. 1 Geo. IV. c. 87 (*b*), which enables landlords to recover in that action, the mesne profits

(*a*) *Ante*, 223.

(*b*) *Ante*, 280, 322.

accruing from the day of the determination of the tenancy (without reference to the day of the demise in the declaration) to the day of the trial, or some *preceding* day. But this mode of recovering the mesne profits is optional with the landlord: and as an action for mesne profits must notwithstanding be resorted to, for the recovery of those profits from the day of the trial, or other *preceding* day, to the day of obtaining possession, and as it is often difficult for the landlord to ascertain what injury he has actually sustained, by the holding over of the tenant (the amount of the damages not being limited to the amount of the rent) until he obtains actual possession, this provision of the statute is in practice seldom resorted to.

It has been said, that a lessor in ejectment may, if he please, waive the trespass, and recover the mesne profits in an action for use and occupation (*a*); but this election must be limited to the profits accruing antecedently to the time of the demise in the ejectment; for the action for use and occupation is founded on *contract*, the action of ejectment upon *wrong*, and they are therefore wholly inconsistent with each other when applied to the same period of time; since in the one action the plaintiff treats the defendant as a *tenant*, and in the other as a *trespasser* (*b*). When, however, a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt upon the 4 Geo. II. c. 28, against the tenant, for double the yearly value of the premises during the time the tenant so holds over: for the double value is given by way of penalty, and not as rent (*c*).

(*a*) *Goodtitle v. North*, Doug. 584; *Doe d. Cheney v. Batten*, Cowp. 243.

(*b*) *Birch v. Wright*, 1 T. R. 378.

(*c*) *Timmings v. Rowlison*, Burr. 1603. It is not yet settled whe-

ther, when the ejectment is founded upon a notice to quit given by the tenant, the landlord is entitled to maintain debt upon the 11 Geo. II. c. 19, for double rent, but it seems the better opinion that he is not; *ante*, 115.

The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and to sign his judgment; but the Court will stay execution until the writ of error is determined (*a*).

The action isailable or not, at the discretion of the Court, or Judge, and when an order for bail is made, the recognizance is usually taken in two years' value of the premises, but this is also discretionary (*b*).

OF THE PARTIES.

The lessor of the plaintiff in the antecedent action of ejectment, is of course the person concerned in interest, but he may bring his action for mesne profits either in his own name, or that of his nominal lessee (*c*). The former, however, is the most advantageous method, as he may then, upon proper proofs, recover damages for the rents and profits received by the defendant, anterior to the time of the demise in the ejectment, which cannot be done in an action at the suit of the nominal plaintiff (*d*); and the Courts will not stay the proceedings until security be given for the costs, which will be done when the action for mesne profits is brought in the name of such nominal lessee (*e*).

It was once indeed doubted whether this action could be maintained in the name of the plaintiff in the ejectment, after a judgment by default against the casual ejector, because,

(*a*) *Harris v. Allen* Cas. Prac. C. P. 46; *Donford v. Ellis*, 12 Mod. 138.

(*b*) *Hunt v. Hudson*. Barn. 85; 1 Sell. Prac. 36.

(*c*) It may here be incidentally observed, that when the ancient practice is resorted to, and the

plaintiff in the ejectment is a real person, the Court will not permit him to release the action for mesne profits, should the lessor bring it in his name. (Close's case, Skin. 247; *Anon.* Salk. 260).

(*d*) B. N. P. 87.

(*e*) Say. Costs, 126.

being a possessory action, an entry must be either proved or admitted, neither of which, it was argued, could in such case be done; but it is now settled, that there is no distinction between a judgment in ejectment upon a verdict and one by default, the right of the claimant being in the one case tried and determined, and in the other confessed (*a*).

A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his companion (*b*).

A joint action for mesne profits, may be supported by several lessors of the plaintiff in ejectment, after a recovery therein, although there were only separate demises by each (*c*).

As the action for mesne profits is an action of trespass, it cannot be maintained against executors or administrators, for the profits accruing during the lifetime of the testator or intestate; nor will a Court of Equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But where the lessor was delayed from recovering an ejectment by a rule of the Court of Law, and by an injunction at the instance of the defendant, who ultimately failed both at law and in equity, the Court decreed an account of the mesne profits against his (the defendant's) executors (*d*).

An actual occupation of the premises by the defendant during the period for which the damages are claimed is unnecessary, it is sufficient if he was interested in and derived benefit from the premises during that period, as for example,

(*a*) *Aislin v. Parkin*, Burr. 665; *Lingon*, 5 M. & S. 64; S. C. 2
Jeffries v. Byson, Stran. 960. Chitty, 410.

(*b*) *Goodtitle v. Tombs*, 3 Wils. 118; *Cutting v. Derby*, Blk. 1077. (*d*) *Pulteney v. Warren*, 6 Vez. J. 73.

(*c*) *Chamier and Another v.*

where it was proved that the defendant, holding at that time lawfully, had underlet to *H.*, and that the defendant and *H.*'s interest became determined, and the right of possession vested in the plaintiff, and that *H.* notwithstanding held on, and continued to pay rent to the defendant, who also declared *H.* to be his tenant when the plaintiff demanded of him possession (*a*). But at the same time proof of actual occupation is always sufficient to charge the defendant; for any person found in possession after a recovery in ejectment is liable to this action; and it is no defence to say that he was upon the premises as the agent and under the license of the defendant in ejectment, for no man can license another to do an illegal act. The measure of the damages however, in cases of this description, will not be the whole mesne profits of the lands, but will depend upon the time the defendant has had them in his occupation, and all the other peculiar circumstances of the case (*b*).

In the case of *Keech d. Warne v. Hall* (*c*), where it was decided that a mortgagee might recover in ejectment without a previous notice to quit, against a tenant claiming under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee, it was asked by the counsel for the defendant, if such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the tenant, as he would then pay the rent twice. Lord Mansfield, C. J. gave no opinion on that point; but said, there might be a distinction, for the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagee, until he determined his will (*d*).

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| (<i>a</i>) <i>Doe v. Harlow</i> , 12 Ad. & Ell. 40; <i>vide Burne v. Richardson</i> , 4 Taunt, 720, and note (<i>d</i>) to <i>Doe v. Harlow</i> , p. 42. | M. T. 39 Geo. III. Wood. L. & T. 511. |
| (<i>b</i>) <i>Girdlestone v. Porter</i> , K. B. | (<i>c</i>) Doug. 21; <i>ante</i> , 29. |
| | (<i>d</i>) <i>Et vide</i> , 4 Ann. c. 16, s. 10. |

OF THE PLEADINGS.

The declaration in the action for mesne profits must expressly state the different parcels of land from which the profits arose, or the defendant may plead the common bar. It should also state the time when the defendant broke and entered the premises and ejected the plaintiff, the length of time during which he so ejected him, and the value of the mesne profits of which he deprived him; and a declaration which does not contain these statements will be holden ill on special demurrer; but the defect is cured by verdict, or after judgment by default and writ of inquiry executed, by the operation of the stat. 4 Ann. c. 16 (*a*).

In the statement of the damages in the declaration the costs of the ejectment may be included, whether the judgment be against the casual ejector, or against the tenant or landlord; and when the judgment is against the casual ejector, for want of an appearance, the costs are invariably included in the statement of the damages, though it is more prudent, for reasons already assigned, in other cases to omit them (*b*); and in a case where after a recovery in ejectment, and before an action for mesne profits, the defendant became bankrupt, and the lessor inserted the taxed costs of the ejectment as damages in his action for mesne profits, but the jury did not include them in their verdict in executing a writ of inquiry therein, the Court refused to set aside the inquisition; because the costs being a liquidated debt, the plaintiff might have proved them under the defendant's commission of bankruptcy, and as he had chosen to take the chance of recovering in an oblique way, more than he could have recovered in a direct manner, and had failed, the Court did not think it necessary to assist him (*c*).

(*a*) *Higgins v. Highfield*, 13 East, 407. *et vide* *Utterson v. Vernon*, 3 T. R. 539, 47; *ante*, 297.

(*b*) *Gulliver v. Drinkwater*, 2 T. R. 261; *Doe v. Davies*, 1 Esp. 358; (*c*) *Gulliver v. Drinkwater*, 2 T. R. 261.

The general issue is *not guilty*; and if the plaintiff declare against the defendant, for having taken the mesne profits for a longer period than six years before action brought, the defendant may plead the Statute of Limitations, namely, *not guilty within six years* before the commencement of the suit, and thereby protect himself from all but six years (a).

(a) B. N. P. 88. Subject to the defence founded on the Statute of Limitations, the party entitled to the possession of real property, and of chattels real, may, by the law of England, recover the mesne profits from the time his title accrued; and at law, this general right to recover is not affected by any equitable circumstances in the situation of the defendant; such as his ignorance of the plaintiff's right, or an innocent mistake in point of law, as to the construction of a demise, the due execution of a power, and the like, where the defendant may have obtained possession in the fullest confidence of the validity of his title.

In equity there are cases in which the right to mesne profits is restricted to the filing of the bill; as where the defendant has possessed in entire and justifiable ignorance of an adverse right, or where the plaintiff has been guilty of laches in prosecuting his claim; see *Dormer v. Fortescue*, 3 Ashurst, 130, and the cases referred to 1 Maddock's Chancery, 90, &c.

According to the civil law, and still more according to the law of some of the countries of Europe, which have adopted the principles of the civil law, the right to recover the profits of real property enjoyed without title, and to which the title of the claimant is established, has been restricted to an extent which

will appear extraordinary to an English lawyer.

By the civil law as laid down in the *Senatus Consultum de Hæreditatis Petitione*; (D. Lib. 5, Tit. iii. l. 20, &c.) *bonæ fidei* possessors are defined to be those "qui justas causas habuissent quare bona ad se pertinere existimassent;" and the distinctions as to liability for intermediate profits in the various cases of *bona fides* and *mala fides* are laid down in the fifth book of the Digest above cited.

Generally in the case of *bonâ fide* possession, the true owner was entitled to mesne profits from the time of *litis contestatio* or plea. And the time from which the *bonæ fidei* possessor was liable, even when held to be *locupletior factus*, (as then having the rents and profits in his hands in specie and unconsumed) was the period of final judgment, or, "*rei judicatæ*." See a clear and concise view of the Roman law upon this subject in *Bynkershoek* (Opera 1, 262). Lib. 8, c. 12. *Observationem Juris Romani*.

The law of Scotland has gone beyond the civil law in favour of the *bonæ fidei* possessor; and the case of *bona fides* has been very liberally construed. Many questions involving this doctrine arose on the leases granted by the late Duke of Queensbury, who being tenant in tail had granted a great number of leases at

Neither bankruptcy (*a*), nor a discharge under the Insolvent Debtors' Act (*b*), can be pleaded in bar to this action; and it has been held that the stat. 6 Geo. IV. c. 16, s. 57, which directs, that all persons *who shall have given credit* upon good and valuable consideration *bonâ fide*, for any money what-

inadequate rents, taking very profitable *grassums* or *finés*, a thing which had been held lawful by a series of decisions of the Scotch Courts, but finally, the law was settled otherwise by the House of Lords, and all the leases granted on such terms by the Duke were set aside. (1 Bligh, 339).

The next heir of entail in prejudice of whom these leases had been granted brought actions for what the law of Scotland terms "*violent profits*;" but it was held in these cases that the *bona fides* of the tenants the lessees, continued till the final judgment in the House of Lords referred to.

A second instance of the same kind arose under a lease granted in 1795 by the Earl of Peterborough, as heir of entail, for a long term at a rent fully adequate at the time to the highest previously received, but taking a sum in hand as *grassum* or *fine*; the next heir of entail instituted an action to reduce the leases, and for "*violent profits*." The first of these claims was decided on the 9th of March, 1819, by the Court of Session, on the same principle as the Queensbury case, in favour of reducing the lease; and this decision was affirmed by the House of Lords on the 5th of July, 1822. The affirmance of the judgment in the Queensbury case, by the House of Lords, was on the 12th of July, 1819. In determining on the claim for "*violent profits*,"

the Court of Session first held that the *bonæ fidei* possession of the lessee ceased on the 12th of July, 1819, the date of the affirmance in the Queensbury cases; but subsequently fixed the period to be the 9th of March, 1819, the date of the judgment of the Court of Session, reducing and setting aside the lease. The defendant contended that the period when *bonæ fidei* possession ceased was the 5th of July, 1822, the date of *affirmance* in the particular case, and again appealed on this ground. It was held on the appeal, that if the only ground of decision had been the point of law, the doubtful state of the law before the affirmance in the Queensbury case might have constituted such affirmance the proper period; but that the facts of the case showed a total want of *bona fides* in the defendant, and that on that ground he was at all events liable from the date of the original reduction, and perhaps from an antecedent period. (*Innes v. Lady Mordaunt and the Duke of Gordon*, 1 Shaw's Scotch Appeals, 169. *Innes v. Executors of the Duke of Gordon*, 4 Wilson and Shaw, 305).

As to the general principles of the law of Scotland on this subject, see Erskine, B., 2 Tit. 1, s. 25; Stair. B. 2 Tit. 1, s. 23.

(*a*) *Goodtitle v. North*, Doug. 584.

(*b*) *Lloyd v. Peel*, 3 B. & A. 407.

soever, which is not due at the time of the bankruptcy, shall be admitted to prove such debts, &c. has been holden not to extend to damages recoverable in an action for mesne profits (*a*).

Where the defendant pleaded a plea of *liberum tenementum*, and that the plaintiff was not possessed *modo et forma*; a replication to such plea by way of estoppel, that after the day from which the mesne profits were sought to be recovered, the plaintiff commenced an action of ejectment for the recovery of the same premises on a demise anterior to that day, and had a judgment to recover his term, concluding with a prayer of judgment if the defendant ought during the said term to be admitted, the replication on general demurrer was held good; and a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad (*b*).

A set off cannot be pleaded to this action. But where a defendant had made a payment on account of ground-rent, becoming due subsequently to the day of the demise in the declaration in ejectment, the jury were directed to deduct this payment from the amount of the damages, on the ground that it was an outgoing falling due during the time of his occupation, from which he could not exonerate himself, and one which the plaintiff must himself have paid, had he been in possession (*c*). And in a case where the defendant had a cross claim against the plaintiff for money expended on the premises, a Court of Equity granted an injunction to restrain the proceedings at law, because of the absence of the right of set off in this action (*d*).

(*a*) *Moggridge v. Davis*, 1 Whit.
16.

(*b*) *Doe v. Wright*, 10 Ad. & Ell.
763.

(*c*) *Doe v. Hare*, 4 Tyr. 29.

(*d*) *Cawdor (Earl) v. Lewis*, 1
You. & C. 427.

OF THE EVIDENCE.

When the plaintiff seeks to recover the mesne profits accruing antecedently to the day of the demise in the declaration in the ejectment, he must produce the regular proof of his title, or right to the possession of the premises, and the judgment in ejectment is not admissible in evidence for him. He must also, it appears, in such case prove an entry upon the lands, though some doubt seems to exist as to what proof of entry will be sufficient. By some it has been said, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession; and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or in other words, until the day of the demise in the ejectment; for that none can have an action for mesne profits unless in case of actual entry and possession. Others have holden, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say that if the law were not so, the Courts would never have suffered plaintiffs in ejectment to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits, to which they would not otherwise be entitled (a). The latter seems the better opinion; but these antecedent profits are now seldom the object of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues (b).

Where the plaintiff proceeds only for the recovery of the mesne profits, accruing subsequently to the day of the demise in the declaration, the judgment in ejectment is *prima facie* evidence of his right; and it is immaterial whether the judgment is founded on a verdict, or has been obtained by default against the casual ejector; and whether the action is brought

(a) *Metcalf v. Harvey*, 1 Ves. 248, 9; B. N. P. 87.

(b) *Ante*, 212.

in the name of the real claimant, or the nominal plaintiff in the ejectment. It was formerly holden that the judgment in such cases operated by way of estoppel, and was conclusive evidence of the plaintiff's right to recover (*a*), but it is now settled law, that no document can operate by way of estoppel unless it appear upon record (*b*); and therefore upon a plea to this action that the premises were not the premises of the plaintiff, the defendant was permitted to prove title in himself, notwithstanding the proof of the judgment in ejectment against him (*c*).

The judgment in the preceding ejectment is also evidence in this action against a party coming into possession and occupying the premises under the defendant in the ejectment, although not himself included in it (*d*); and it is in like manner evidence when the action is brought against a party who has not been in the actual occupation, provided it be proved that the defendant in ejectment was his tenant, and that the relation of landlord and tenant subsisted between them (*e*); and this relationship must be proved by the production of the agreement, if the tenancy has not been created by parol (*f*).

But a judgment in ejectment is not evidence against a previous occupier (*g*). Nor is a judgment in ejectment against a wife evidence in an action for mesne profits against the husband and wife, for the wife's confession of a trespass committed by her cannot be given in evidence to affect the husband, in an action in which he is liable for the damages and costs (*h*); and if the action for mesne profits be brought against the landlord, after a judgment by default against the casual ejector, such judgment will not be evidence against him, without proof that

(*a*) *Aislin v. Parkin*, Burr. 683; B. N. P. 87.

(*b*) *Vooght v. Winch*, 2 B. & A. 662.

(*c*) *Doe v. Huddart*, 4 Dow. P. C. 437; 5 Tyr. 846.

(*d*) *Doe v. Whitcomb*, 8 Bing. 46.

(*e*) *Doe v. Harlow*, 12 Ad. & Ell. 42, note (*d*).

(*f*) *Doe v. Harvey*, 8 Bing. 239.

(*g*) B. N. P. 87.

(*h*) *Denn v. White*, 7 T. R. 112.

he received due notice of the service of the ejectment upon the tenant in possession (*a*). But where a landlord subsequently to the judgment promised to pay the rent and costs to the plaintiff, Lord Ellenborough, C. J., was of opinion, that such promise, there being no proof that he had received notice of ejectment, amounted to an admission, that the plaintiff was entitled to the possession of the premises, and that he was a trespasser (*b*).

When, therefore, the plaintiff seeks to recover such profits only as have accrued subsequently to the demise in the ejectment, no other evidence of his title is, generally speaking, required, than examined copies of the judgment in ejectment, of the writ of possession, and of the sheriff's return thereon (*c*); but if there is any reason to suppose that the defendant will attempt to answer this *prima facie* case by setting up a title in himself or a third party, or if the case be one of those excepted cases in which the judgment in ejectment is not admissible evidence, then the plaintiff should be prepared with the regular proof of his title, although he does not seek to recover the mesne profits anterior to the day of the demise.

Proof of the execution of a writ of possession is of course unnecessary, if the plaintiff has been let into possession by the defendant in the action (*d*). And it has been doubted whether such evidence is ever necessary, except upon judgment by default against the casual ejector, but it is, notwithstanding, prudent to be prepared with it in all cases, unless the plaintiff has been let into possession by the defendant (*e*).

(*a*) *Hunter v. Britts*, 3 Camp. 455.

(*b*) *Hunter v. Britts*, 3 Camp. 455.

(*c*) *Astlin v. Parkin*, B. N. P. 87.

(*d*) *Calvert v. Horsefall*, 4 Esp. 67.

(*e*) *Vide Thorp v. Fry*, B. N. P. 87, *et* S. N. P. 693, (n. 50), *et* *Aislin v. Parkin*, Burr. 665. The reason assigned for this distinction is, that where the judgment is had against the tenant in possession, the defendant, by entering into the

The plaintiff must also prove the length of time that the defendant (or his tenants if he be the landlord) have been in possession of the premises, for the judgment in ejectment affords no evidence of possession, and he can only recover damages for the time he proves the defendant to be in actual occupation, or receipt of the rents and profits. The production of the consent rule proves possession, only from the time of the service of the declaration (a).

OF THE DAMAGES.

The amount of the damages must also be proved; and as the action for mesne profits is an action of trespass *vi et armis*, the jury are not confined in their verdict to the mere *rent* of the premises, although the action is said to be brought to recover the *rents and profits* of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand (b).

If the costs are stated in the declaration as part of the damages, they must of course also be proved in the ordinary manner; and if the ejectment has been defended, his claim is limited to the amount of *the taxed costs* only (c). But where the judgment has been obtained by default against the casual ejector, he is allowed to recover reasonable costs as between attorney and client (d), and the same principle has been acted

consent rule, is estopped both as to the lessor and lessee, so that either may maintain trespass, without an actual entry, but that where the judgment is had against the casual ejector, no rule having been entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. But this reasoning is not satisfactory; for if the tenant be concluded by the judgment in the ejectment from controverting the plaintiff's

title, it should seem he is also concluded from controverting his possession, for possession is part of his title.

(a) *Dodwell v. Gibbs*, 2 C. & P. 615.

(b) *Goodtitle v. Tombs*, 3 Wils. 118, 121.

(c) *Brooke v. Bridges*, 7 B. Moore, 404, 471; *Doe v. Davis*, 1 Esp. 358; *Doe v. Hare*, 2 Dow. P. C. 245.

(d) *Doe v. Huddart*, 4 Dow. P. C. 437; 5 Tyr. 846.

upon with respect to costs incurred by the plaintiff in a Court of Error in reversing a judgment in ejectment obtained by the defendant, although they were costs which the Court of Error had no power to allow (*a*). And in a case where the defendant in ejectment had appeared and pleaded, and afterwards withdrew his plea, the plaintiff was allowed to recover his costs in the action although they had not been taxed (*b*).

The plaintiff will also be entitled to give evidence of any injury done to the premises, in consequence of the misconduct of the defendant, provided such fact be specially alleged in the declaration.

If in an ejectment there be a verdict for the plaintiff, and the defendant bring a writ of error, and enter into a recognizance to pay costs in case of nonsuit, &c., pursuant to stat. 16 & 17 Car. II. c. 8, and he be nonsuited, &c., the defendant in error needs not bring a *scire facias* or debt on the recognizance, but may sue out an *elegit*, or writ of inquiry, to recover the mesne profits since the first judgment in ejectment (*c*).

(*a*) Nowell *v.* Roake, 7 B. & C. 29.

404.

(*c*) Short *v.* Heath, 2 Crompt.

(*b*) Symonds *v.* Page, 1 C. & J. Prac. 225.

APPENDIX.

No. 1.

SIR,

I hereby give you notice to quit and deliver up, on the _____ day
of _____ next, the possession of the messuage or dwelling house,
(or "rooms and apartments," or "farm lands and premises"), with
the appurtenances, which you now hold of me, situate in the parish
of _____ in the county of _____

Notice to quit
by the land-
lord, to a te-
nant from year
to year.

Dated the _____ day of _____ 18 _____ Yours, &c.

A. B.

To Mr. C. D. (the tenant in possession): or (if it be doubtful
who is tenant), To Mr. C. D. or whom else it may concern.

No. 2.

SIR,

I do hereby, as the agent for and on behalf of your landlord A. B.
of _____ give you notice to quit and deliver up, on (&c.) (as in
No. 1), which you now hold of the said A. B. situate, (&c.).

The like, by
an agent for
the landlord.

Dated, (&c.) _____

Yours, &c., E. F.

Agent for the said A. B.

To Mr. C. D. (&c.)

No. 3.

SIR,

I hereby give you notice, &c. (as in No. 1, to _____ "county
of _____") provided your tenancy originally commenced at that
time of the year; or otherwise, that you quit and deliver up the

The like, by
the landlord,
where the com-
mencement of
the tenancy is
doubtful.

possession of the said messuage, (&c.) at the end of the year of your tenancy, which shall expire next after the end of half-a-year from the time of your being served with this notice.

Dated, (&c.)

Yours, &c.

To Mr. C. D. (&c.)

A. B.

No. 4.

The like, by a tenant from year to year, of his intention to quit.

SIR,

I hereby give you notice of my intention to quit, and that I shall on the day of next, quit and deliver up the possession of the messuage, (&c.), which I now hold of you, situate, (&c.)

Dated, (&c.)

Yours, &c.

To Mr. A. B.

C. D.

No. 5.

Letter of attorney to enter and seal a lease of the premises.

Know all men by these presents, that I, A. B. of, (&c.) have made, ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint C. D. of, (&c.) my true and lawful attorney, for me, and in my name, to enter into and take possession of a certain messuage, &c. late in the tenure and occupation of G. H., situate, (&c.) but now untenanted; and after the said C. D. hath taken possession thereof, for me, and in my name, and as my act and deed, to sign, seal, and execute a lease of the said premises with the appurtenances, unto E. F. of, (&c.) to hold the same to him the said E. F. his executors, administrators, and assigns, from the of last past, before the date hereof, for the term of seven years, at the yearly rent of a peppercorn, if lawfully demanded; subject to a proviso, for making void the same, on tendering the sum of sixpence to the said E. F. his executors or administrators. In witness, (&c.)

Sealed and delivered, (&c.)

No. 6.

Affidavit of executing the same.

I. K. of (&c.) gentleman, maketh oath and saith, that he was present and did see A. B. of, (&c.) named in the letter of attorney hereunto annexed, duly sign, seal and deliver the said letter of attorney.

Sworn, (&c.)

I. K.

No. 7.

This indenture made the day of (&c.) between Lease.
A. B. of, (&c.) of the one part, and E. F. of, (&c.) of the other
part, witnesseth, that the said A. B. for and in consideration of the
sum of five shillings of lawful money of Great Britain, to him in
hand paid by the said E. F. at or before the sealing and delivery
of these presents, the receipt whereof the said A. B. doth hereby
acknowledge, hath demised granted and to farm let unto the said
E. F. his executors and administrators, all that messuage, (&c.)
situate, (&c.) late in the tenure and occupation of G. H., but now
untenanted; to have and to hold the same unto the said E. F. his
executors and administrators, from the day of last
past, before the date hereof, for and during and unto the full end and
term of seven years from thence next ensuing, and fully to be com-
plete and ended; yielding and paying therefore yearly and every
year, during the said term, unto the said A. B. or his assigns, the
rent of one peppercorn, if lawfully demanded at the feast of
Provided always, and these presents are on this condition, that if the
said A. B. or his assigns shall at any time or times hereafter, tender
or cause to be tendered unto the said E. F. his executors and admi-
nistrators, the sum of sixpence, that then and in such case, and from
thenceforth, this present indenture, and every thing herein contained,
shall cease, determine, and be absolutely void, anything herein con-
tained to the contrary thereof in any wise notwithstanding. In wit-
ness whereof, the parties hereto have interchangeably set their hand
and seals, the day and year first above written.

Sealed and delivered, as the act and deed of the above
named A. B. by C. D. of _____ by virtue of a letter
of attorney to him for that purpose, made by the said
A. B. bearing date, (&c.) being first duly stamped in
the presence of _____ I. K. }

No. 8.

Take notice, that unless you appear in her Majesty's Court of Queen's Bench at Westminster, within the first four days (or, if in the country, within the first eight days) of next Term, at the suit of the above named plaintiff E. F., and plead to this declaration in ejectment, judgment will be thereon entered against you by default.

Yours, &c.

I. K. plaintiff's attorney.

No. 9.

Affidavit to
move for judg-
ment in K. B.

In the Queen's Bench.

Between { E. F. on the demise of A. B. plaintiff, and
 { G. P. defendant.

I. K. of gentleman, maketh oath and saith, that on the
 day of last, he this deponent did see C. D. in the
letter of attorney hereunto annexed named, for and in the name of
A. B. the lessor of the plaintiff, enter upon and take possession of
the messuage in the lease hereto also annexed mentioned, by entering
on the threshold of the outer door thereof; and putting his finger
into the keyhole of the said door, the said messuage being then
locked up and uninhabited, so that no other entry thereon could be
made, nor any possession thereof taken, without force; and this
deponent further saith, that he did, on the same day, see the above
named C. D. after such entry made, and whilst he stood on the
threshold of the said door, duly sign and seal the lease hereunto
annexed, in the name of the said A. B. and as his act and deed
deliver the same unto the said E. F. the plaintiff above named; and
that after the said lease was so executed, this deponent did see the
said E. F. take possession of the said messuage, by virtue of the said
lease, by entering upon the threshold of the said outer door, and
putting his finger into the key-hole of the said door, the said mes-
suage being then locked up and uninhabited, so that no other entry
could be made thereon, save as aforesaid; and that immediately
afterwards, the said G. H. the defendant, came and removed the said
E. F. from the said door, and put his foot on the threshold thereof;
whereupon this deponent did, on the day and year aforesaid, deliver
to the said defendant G. H. who still continued upon the said
threshold, a true copy of the declaration of ejectment, and notice
thereunder written hereto annexed.

Sworn, (&c.)

No. 10.

Victoria, (&c.) to the sheriff of greeting: If John Doe
shall give you security of prosecuting his claim, then put by gages
and safe pledges Richard Roe, late of yeoman, that he be
before us, on wheresoever we shall then be in England, (or
in C. P. "that he be before our justices at Westminster, on ")
to show wherefore, with force and arms, he entered into mes-
suages, (&c.) with the appurtenances, in which A. B. hath

demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against our peace: And have you there the names of the pledges, and this writ. Witness ourselves at Westminster, the day of
in the year of our reign.

No. 11.

Pledges to prosecute	{ JOHN DEN. RICHARD FEN.	Sheriff's return thereto.
The within named Richard	{ JOHN SMITH.	
Roe is attached by pledges	{ WILLIAM STILES.	

No. 12.

In the Queen's Bench.

Term, in the year of the reign of Queen Victoria.	Declaration by original, on a single demise, with notice to appear thereto.
(to wit) Richard Roe late of yeoman, was attached	
to answer John Doe of a plea, wherefore the said Richard Roe, with	
force and arms, &c. entered into messuages, barns,	
stables, outhouses, yards, gardens,	
orchards, acres of arable land, acres of	
meadow land, and acres of pasture land, with the appur-	
tenances, situate, &c. which A. B. had demised to the said John	
Doe, for a term which is not yet expired, and ejected him from his	
said farm; and other wrongs to the said John Doe there did, to the	
great damage of the said John Doe, and against the peace of our	
lady the now Queen, (&c.) And thereupon the said John Doe, by	
his attorney, complains; that whereas the said A. B. on	
(&c.) at (&c.) had demised the said tenements with the appurtenances,	
to the said John Doe, to have and to hold the same to the said John	
Doe and his assigns, from the day of then last past,	
for and during and unto the full end and term of years from	
thence next ensuing, and fully to be complete and ended: By virtue	
of which said demise, the said John Doe entered into the said tene-	
ments with the appurtenances, and became and was thereof possessed,	
for the said term so to him thereof granted: And the said John Doe	
being so thereof possessed, the said Richard Roe afterwards, to wit,	
on (&c.) with force and arms, (&c.) entered into the said tenements	
with the appurtenances, which the said A. B. had demised to the	
said John Doe, in manner and for the term aforesaid, which is not	

yet expired, and ejected the said John Doe from his said farm ; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lady the now Queen ; wherefore the said John Doe saith, that he is injured, and hath sustained damage to the value of £ and therefore he brings his suit, &c.

No. 13.

Notice to appear.

Mr. C. D.

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or some part thereof ; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next Term, (or, in London or Middlesex, "on the first day of next Term") in her Majesty's Court of Queen's Bench, wheresoever her said Majesty shall then be in England, (or, "in her Majesty's Court of Common Bench, or her Majesty's Court of Exchequer at Westminster,") by some attorney of that Court ; and then and there, by rule of the same Court, to cause yourself to be made defendant in my stead : otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession.

Yours, &c.,

RICHARD ROE.

No. 14.

The like, on a double demise, with one ouster.

In the Queen's Bench, (or Common Pleas, or Exchequer.)
Term (&c.)

(to wit,) Richard Roe, late of yeoman, was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, &c. entered into messuages, (&c.) with the appurtenances, situate, &c. which A. B. had demised to the said John Doe, for a term which is not yet expired ; And also wherefore the said Richard Roe, with force and arms, &c. entered into other messuages, (&c.) with the appurtenances, situate, &c. which E. F. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said several farms, and other wrongs, (&c.) And thereupon, (&c.) that whereas the said A. B. on, &c. at, &c. had demised the said tenements first above mentioned, with the appurtenances, to the said John Doe ; to have and to hold

the same to the said John Doe and his assigns, from the day of then last past, for, and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended.* And also that whereas the said E. F. on, &c. at, &c. had demised the said tenements secondly above mentioned with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the said day of then last past, for, and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended: By virtue of which said several demises, the said John Doe entered into the said several tenements first and secondly above mentioned with the appurtenances, and became and was thereof possessed, for the said several terms so to him thereof respectively granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, (&c.) entered into the said several tenements first and secondly above mentioned with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms; and other wrongs; &c. (as in the preceding precedent with the like notice to appear.)

No. 15.

(As in last precedent to this mark.*) By virtue of which said demise, the said John Doe entered into the said tenements first above mentioned with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted, and the said John Doe being so thereof possessed, the said Richard Roe afterwards, (to wit,) on, &c. with force and arms, &c. entered into the said tenements first above mentioned with the appurtenances, which the said A. B. had demised to the said John Doe, in manner and for the term aforesaid, which is not yet expired, and ejected him the said John Doe from his said farm: And also, that whereas the said E. F. on, &c. at &c. had demised the said tenements secondly above mentioned with the appurtenances, to the said John Doe; to have and to hold the same to the said John Doe and his assigns, from the said day of then last past, for and during and unto the full end and term of years from thence next ensuing, and fully to be complete and ended: By virtue of which said last mentioned demise, the said John Doe entered into the said tenements secondly above men-

The like, with two ousters.

tioned with the appurtenances, and became and was thereof possessed for the said last mentioned term so to him thereof granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, &c. entered into the said tenements secondly above mentioned with the appurtenances, which the said E. F. had demised to the said John Doe, in manner and for the term last aforesaid, which is not yet expired, and ejected the said John Doe from his said last mentioned farm, and other wrongs, &c. (as in No. 14, with the like notice to appear.)

No. 16.

Affidavit of
service of de-
claration in
ejectment.

In the Queen's Bench, (Common Pleas, or Exchequer of Pleas.)
Between { John Doe on the demise of A. B. plaintiff, and Richard
Roe, - - - - - defendant.

I. K. of gentleman, maketh oath, that he this deponent did on, &c.* personally serve C. D. tenant in possession of the premises in the declaration of ejectment hereunto annexed mentioned, or (if he be not tenant of the whole) some part thereof, with a true copy of the said declaration, and of the notice thereunder written, hereunto annexed, and this deponent at the same time read over the said notice to the said C. D. and explained to him the intent and meaning of such service,† (or generally thus: and this deponent, at the same time, acquainted the same C. D. of the intent and meaning of the said declaration and notice.)

Sworn, &c.

I. K.

No. 17.

The like where
there are several
tenants.

(As in last precedent to this mark*) personally serve C. D. (&c.) tenants in possession, (&c.) (as in the last) with the said declaration, and the notice thereunto written, by delivering a true copy of the said declaration and notice to each of them the said C. D. &c. (and if the notice was not directed to all the tenants, say "except that the said notice was directed to each of them the said C. D. &c. separately;") and this deponent at the same time read over the said notice to each of them the said C. D. (&c.) and explained to them respectively the intent and meaning of such service; (or generally, that "this deponent, at the same time, acquainted each of them the said C. D. &c. of the intent and meaning of the said declaration and notice.")

Sworn, &c.

I. K.

No. 18.

(As in No. 16. to*) personally serve C. D. tenant in possession of part of the premises in the declaration of ejectment hereunto annexed mentioned, with a true copy, &c. (as in No. 16 to†): And this deponent further saith, that he did, on the same day, also serve G. H. tenant in possession of other part (or residue) of the premises in the said declaration mentioned, with another true copy of the said declaration and notice thereunder written, by delivering the same to, and leaving it with M. H. the wife of the said G. H. at the dwelling-house of the said G. H. being a parcel of the premises in the said declaration mentioned, and this deponent at the same time read over the notice thereunder written to the said M. H. and explained to her the intent and meaning of such service.

(Sworn, &c.)

I. K.

The like, where the declaration was served on one tenant, and the wife of another.

No. 19.

In the Queen's Bench, (&c.)

Between { John Doe on the demise of A. B. plaintiff, and Richard
Roe, defendant.

The like, on stat. 4 Geo. II. c. 28, where the premises are untenanted.

A. B. of lessor of the plaintiff in this case, and I. K. both of gentleman, severally make oath and say ; and first, this deponent I. K. for himself saith, that he did on, &c. affix a copy of the declaration in ejectment hereto annexed, and the notice thereunder written upon the door of the messuage in the said declaration mentioned, (or, in case the ejectment is not for the recovery of a messuage, " upon being a notorious place of the lands, tenements or hereditaments, comprised in the said declaration in ejectment,") there being no tenant then in actual possession thereof. And this deponent A. B. for himself saith, that before such a copy of the said declaration in ejectment was so fixed as aforesaid, there was due to him this deponent, as landlord of such messuage, (or "lands, tenement, or hereditaments,") with the appurtenances, from C. D. the tenant thereof, the sum of £ for half-a-year's rent, upon and by virtue of a certain indenture of lease, bearing date, &c. and made between, &c. and that no sufficient distress was then to be found upon the said messuage, (or, "lands, tenements, or hereditaments,") with the appurtenances, countervailing the arrears of rent then due to this deponent ; And this deponent further saith, that at the time of affixing the copy of the said declaration in ejectment as

aforesaid, he had power to re-enter the said messuage, (or lands, tenements, and hereditaments,") with the appurtenances, by virtue of the said lease, for the non-payment of the rent so in arrear as aforesaid.

Sworn, (&c.)

A. B.
I. K.

No. 20.

Rule for judgment, for the whole premises
Q. B.

next after in the year of, &c.
Doe on the demise of A. B. } Unless the tenant in possession of (or,
v. Roe } if the premises are untenanted, "unless
some person claiming title to") the premises in question shall appear
and plead to issue, on next after let judgment be entered
for the plaintiff, against the now defendant Roe by default.

Upon the motion of Mr.

By the Court.

No. 21.

The like, for
part.

Doe on the demise of A. B. } Unless C. D. tenant in possession of
v. Roe } part of the premises in question, shall
appear and plead to issue, on next after let judgment be entered for the plaintiff, against the now defendant Roe, by default: But execution shall issue for such part of the premises only as is in his possession.

Upon the motion of Mr.

By the Court.

No. 22.

The like,
where part of
the premises
are tenanted,
and part untenanted.

Doe on the demise of A. B. } Unless C. D. (&c.) tenants in possession of part of the premises in question, and unless or some other person claiming title to such part of the said premises as are untenanted shall appear and plead to issue, on next after let judgment be entered for the plaintiff against the now defendant Roe, by default: but execution shall issue for such part of the premises only as is in the possession of the said tenants, and such other parts as are untenanted.

By the Court.

No. 23.

As yet of Term, in the year, &c.

Witness, Thomas Lord Denman

——— (to wit,) John Doe, on the demise of A. B. puts in his place I. K. his attorney, against Richard Roe, in a plea of trespass and ejectment of farm.

——— (to wit) The said Richard Roe in person, at the suit of the said John Doe in the plea aforesaid.

——— (to wit) Richard Roe was attached to answer John Doe, &c. (*copy the declaration to the end, omitting the notice, and proceed on a new line as follows :*)

Judgment for the plaintiff by *nil dicit* by original in Q. B. with a *remittitur damna*.

And the said R. R. in his proper person, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said J. D. whereby the said J. D. remains therein undefended against the said R. R.: Therefore it is considered, that the said J. D. recover against the said R. R. his said term yet to come of and in the tenements aforesaid, with the appurtenances; and also his damages sustained by reason of the trespass and ejectment aforesaid:—And hereupon the said J. D. freely here in Court remits to the said R. R. all such damages, costs and charges, as might or ought to be adjudged to him the said J. D. by reason of the trespass and ejectment as aforesaid: therefore, let the said R. R. be acquitted of those damages, costs and charges, &c.:—And hereupon the said J. D. prays the writ of the said Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come of, and in the tenements aforesaid, with the appurtenances: and it is granted to him, returnable before the said Lord the King, on ——— wheresoever, &c.

No. 24.

——— on (or next after) ——— in the ——— year, &c.

——— (to wit) Doe on the demise of A. B. against Roe, for messuages (&c.) in the parish of in the said county: (*or, if there be several demises, say*) “Doe, on the demise of A. B. for messuages, (&c.) in the parish of in the said county, and also on the demise of E. F. for other messuages (&c.) in the parish of in the said county, against Roe;” and if the tenant appear for part only, add, “being part of the premises mentioned in the declaration.”

It is ordered by the consent of the attornies for both parties, that C. D. be made defendant in the stead of the now defendant Roe, and do forthwith appear at the suit of the plaintiff; and (if the ejectment be by

Consent of attornies, for the tenant to be admitted to defend, &c. in Q. B.

bill) file common bail, and receive a declaration in an action of trespass and ejectment, for the premises in question, which said premises, he the said C. D. does hereby admit to be or consist of, (*Here describe the premises for which it is intended to defend*) for which he intends as (tenant or landlord, as the case may be) to defend this action of trespass and ejectment. And it is further ordered by the like consent, that the said C. D. do forthwith plead not guilty thereto; and upon the trial of the issue,* confess lease, entry, and ouster, and that he was, at the time of the service of the said declaration, in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant Richard Roe, by default, and if upon trial of the said issue, the said C. D. shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute his (*writ or bill*) against the said C. D. then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff, in that case to be taxed by the master. And it is further ordered, that if upon the trial of the said issue a verdict shall be given for the said C. D., or it shall happen that the plaintiff shall not further prosecute his the said (*writ or bill*) for any other cause than for not † confessing lease, entry, ouster, and such possession as aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

I. K. attorney for plaintiff,

L. M. attorney for defendant.

No. 25.

Consent rule in
C. P.

In the Common Pleas.

_____ Term in the _____ year, &c.
_____ the _____ day of _____

_____ (to wit) Doe, on the demise of } It is ordered by con-
A. B. against Roe. } sent of I. K. attorney

for the plaintiff, and L. M. attorney for C. D. who claims title to the tenements in question, which premises he, the said C. D. hereby admits to be or consist of (*here describe the premises for which it is intended to defend*) for which he intends as *tenant or landlord*) to defend this action of trespass and ejectment, that he may be admitted defendant, and that the said defendant shall immediately appear by his attorney, who shall receive a declaration, and plead thereto the general issue, this Term; and at the trial thereupon to be had, the said defendant shall appear in his own proper person, or by

counsel or attorney, and confess lease, entry, and ouster, and that he was, at the time of the service of the declaration, in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant by default. And by the like consent, it is ordered, that if upon trial of the said issue, the said C. D. shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute this action against the said C. D., then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff's lessor in that case, to be taxed by the prothonotary. And it is further ordered by the like consent, that if upon the trial of the said issue, a verdict be found for the said C. D., or it shall happen that the plaintiff shall not further prosecute his said action for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the Court.

No. 26.

In the Queen's Bench.

C. D. of &c. maketh oath and saith, that no actual ouster of the lessor of the plaintiff has been committed by this deponent, and that (as he this deponent verily believes) this ejectment may involve a question between tenants in common, or joint-tenants.

Sworn, (&c.)

C. D.

Affidavit in support of rule, to authorize the tenant to confess lease and entry only in Q. B.

No. 27.

Doe, on the demise of A. v. } Upon reading the rule made
Roe } yesterday, and upon hearing Mr.
— &c. for the lessor of the plaintiff, and Mr. — &c. for the
tenant; it is ordered, that the defendant enter into a rule for confessing lease, entry, and possession, and also for confessing ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise.

By the Court.

Rule in Q. B. to authorize the tenant to confess lease and entry only.

No. 28.

Doe } It is ordered, &c. (as in No. 24, to*) confess lease, Consent rule
v. } entry, and that he was at the time of the service of the thereon.
Roe. } declaration in possession of the premises hereinbefore

mentioned and specified, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise, and insist upon the title and such actual ouster only ; otherwise let judgment be entered for the plaintiff against the now defendant Roe, by default. And if upon the trial of the said issue, the said C. D. shall not confess lease and entry, and also ouster upon the condition aforesaid, whereby &c. (*as in No. 24, to†*) confessing lease, entry, and such possession as aforesaid, and also ouster subject to the conditions aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the Court.

No. 29.

Rule in Q. B.
for admitting
the landlord to
defend, &c.

Doe, on the demise of A. B. v. } It is ordered that E. F. land-
Roe } lord of the tenant in possession
of the premises in question in this cause, shall be joined and made
defendant with the said tenant, if he shall appear : And the said
E. F. desiring, if the said tenant shall not appear, that he may
appear by himself, and consenting that in such case he will enter
into the common rule to confess lease, entry, and ouster, in such
manner as the said tenant ought, in case he had appeared ; (*or if the
rule be special, to confess lease and entry only, say “ to confess lease
and entry only, without ouster, unless an actual ouster of the lessor
of the plaintiff, by the said C. D. or those claiming under him, be
proved at the trial,”*) leave is given to the said E. F. pursuant to the
late act of Parliament, if the said tenant shall not appear, to appear
by himself, and upon his entering into such common rule, to become
defendant instead of the casual ejector, and to defend his title to the
said premises without the said tenant : the plaintiff nevertheless is at
liberty to sign judgment against the casual ejector ; but execution
thereon is stayed, until the Court shall further order. Upon the
motion of Mr. ———

By the Court.

No. 30.

Plea of not
guilty.

C. D. } Term (&c.) And the said
ats. } C. D. by L. M. his attorney, comes
Doe, on the demise of A. B. } and defends the force and injury,
when, &c., and says that he is not guilty of the supposed trespass
and ejectment, (*or if several ousters are laid in the declaration, “ of*

the supposed trespasses and ejectments,") above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him; and of this he the said C. D. puts himself upon the country, &c.

No. 31.

C. D. } And the said — by — his Plea of ancient
ats. } attorney comes and defends the demesne.

Doe, on the demise of A B. } force and injury, when, &c., and says that all the tenements and premises in the declaration aforesaid specified, in which the trespass and ejectment are above supposed to have been done, are held of — as of his manor of — in the county of — and which said manor is, and from time whereof the memory of man is not to the contrary was, of ancient demesne of the Crown of the Queen of England, and now of our Lady the Queen; and that the aforesaid tenements and premises are and for all the time aforesaid were pleaded and pleadable in the Court of the same manor by patent writ of our Lady the Queen of right close only and not elsewhere or otherwise; and this he is ready to verify as the Court shall think proper; Wherefore he prays judgment if the Court of our said Lady the Queen, now here will take cognizance of the said plea, &c.

No. 32.

C. D. the tenant in possession of the premises in the declaration of ejectment in this cause above mentioned, maketh oath, and saith, that the said premises in the said declaration in this cause above mentioned, with the appurtenances, are held of — as of his manor of — in the county of — and which said manor is holden in ancient demesne: and this deponent further saith, and there is a Court of ancient demesne held within the said manor of — and that there are suitors in the same Court, in which said Court and before which suitors the said A. B., the lessor of the plaintiff above named might have proceeded in the said ejectment; and this deponent further saith, that to the best of this deponent's knowledge and belief, the said A. B. the said lessor of the plaintiff is seized in his demesne as of fee of and in the said premises with the appurtenances in the said declaration of ejectment mentioned.

Sworn, &c.

C. D.

No. 33.

Postea for defendant on a nonsuit, for not confessing lease, entry and ouster.

Afterwards, that is to say, on &c. at &c. before, (&c.) comes the within-named John Doe, by his attorney within mentioned and the within-named C. D. although solemnly required, comes not, but makes default ; therefore, let the jurors of the jury whereof mention is within made, be taken against him by his default ; and the jurors of that jury being summoned also to come, and to speak the truth of the matters within contained, being chosen, tried and sworn, the said C. D. although solemnly called to appear by himself or his counsel or attorney, to confess lease, entry and ouster, and possession of the premises hereinbefore mentioned, doth not come, by himself or his counsel or attorney, nor doth he confess lease, entry, ouster, and possession, but therein makes default ; wherefore the said John Doe doth not further prosecute his writ (or bill) against the said C. D.

Therefore, &c.

No. 34.

Judgment for the plaintiff, as to part of the premises, and for the defendant, on a *nolle prosequi*, as to the residue.

(*To the end of the issue, and then as follows :*) At which day before our Lady the Queen at Westminster (*or in the Common Pleas or Exchequer* "At which day comes here,") the parties aforesaid, by their attornies aforesaid ; and hereupon the said C. D. as to ——— parcel of the tenements in the said declaration mentioned, relinquishing his said plea by him above pleaded, says that he cannot deny the action of the said John Doe, nor but that he the said C. D. is guilty of the trespass and ejectment above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him ; and upon this the said John Doe says, that he will not further prosecute his suit against the said C. D. for the trespass and ejectment in the residue of the tenements aforesaid ; and he prays judgment, and his term yet to come of and in the said ——— with the appurtenances, parcel, &c. together with his damages, costs and charges by him in this behalf sustained : Therefore it is considered, that the said John Doe do recover against the said C. D. his said term yet to come of and in the said ——— with the appurtenances, parcel, (&c.) and also £——— for his said damages, costs and charges, by the Court of the said Lady the Queen now here adjudged to the said John Doe, and with his assent, and also with the assent of the said C. D. : And let the said C. D. be acquitted of the said trespass and ejectment in the residue of the tenements aforesaid, and

go thereof without day, (&c.): And the said John Doe prays the writ of our said Lady the Queen, to be directed to the sheriff of ——— aforesaid, to cause him to have possession of his said term yet to come of and in the said ——— with the appurtenances, parcel, (&c.) and it is granted to him, returnable before our said Lady the Queen on ——— wheresoever, (&c.) (*or in the Common Pleas or Exchequer*, “returnable here on ——— &c.”)

No. 35.

Doe, on the demise of A. B. v. } Upon reading a rule made in
Roe } this cause on ——— and E. F.
therein named, having made himself defendant in the stead of the casual ejector, pursuant to the said rule, and the postea in the said cause being produced and read, and a rule made in the same cause this day; it is ordered that the said E. F. upon notice of this rule to be given to his attorney, (&c.) show cause, why the plaintiff should not have leave to sue out execution, upon the judgment signed against the casual ejector pursuant to the first mentioned rule. Upon the motion of Mr. ——— By the Court.

Rule for execution against the casual ejector, where the landlord had been made defendant, and failed at the trial.

No. 36.

Victoria, (&c.) To the sheriff of ——— greeting: Whereas John Doe lately in our Court before us at Westminster, by our writ, (*or if by bill, say “by bill without our writ,”*) and by the judgment of the same Court recovered against C. D. (*or if the judgment be by default “against Richard Roe,”*) his term[†] then and yet to come of and in ——— dwelling-houses, (&c.) (*as in the declaration in ejectment*) with the appurtenances, situate (&c.) which A. B. on (&c.) had demised to the said J. D. to hold the same to the said J. D. and his assigns, from (&c.) for and during and until the full end and term of ——— years from thence next ensuing, and fully to be complete and ended, * by virtue of which said demise, the said J. D. entered into the said tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards (to wit,) on (&c.) with force and arms, (&c.) entered into the said tenements with the appurtenances, which the said A. B. had demised to the said J. D. in manner, and for the term aforesaid, which was not then, nor is yet expired, and ejected the said J. D. from his said farm ; whereof the said C. D. is convicted, as appears to us of record; therefore we command you, that without delay you cause the said J. D. to have

Habere facias possessionem.

the possession of his said term yet to come of and in the tenements aforesaid, with the appurtenances: and in what manner you shall have executed this our writ, make appear to us, on where-soever we shall then be in England, (or by bill, "to us at Westminster, on next after ,"[†]) and have there (or by bill, "have there then,") this writ.

Witness, Thomas Lord Denman, (&c).

No. 36. (a)

The like, on a double demise.

(As in preceding precedent to *;) and also his term, then, and yet to come, of and in other dwelling-houses, (&c.) with the appurtenances, which E. F. on, (&c.) had demised to the said J. D., to hold the same to the said J. D. and his assigns, from, &c. for, and during, and unto, the full end and term of years from thence next ensuing, and fully to be complete and ended; by virtue of which said several demises, the said J. D. entered into the said several tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards, to wit, on, (&c.) with force, and arms, (&c.) entered into the said several tenements, with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner, and for the several terms aforesaid, which were not then, nor are yet expired, and ejected the said J. D. from his said several farms; whereof the said C. D. is convicted, (*adding in Q. B.* "as appears to us of record:") therefore we command you, that without delay, you cause the said J. D. to have the possession of his said several terms, yet to come of, and in, the said several tenements with the appurtenances: and in what manner, &c. (*as in preceding precedent to the end.*)

No. 37.

The like, when the Judge has certified under stat. 1 Wm. IV. c. 70.

Victoria, (&c.) to the Sheriff of greeting: Whereas at the assizes holden at in and for the county of on the day of last, before Sir Nicholas Conyngham Tindal, Knt. L. C. J., (&c.) a cause came on to be tried, in which John Doe was the plaintiff, and C. D. the defendant, and in which cause the said John Doe sought to recover against the said C. D. his term, (*as in precedent No. 36, from † to §.*) And whereas at the trial of the said cause, the jury found a verdict for the said John Doe, and the said Sir Nicholas Conyngham Tindal hath duly certified on the back of the said record in the said action, according to

the form of the statute in that case made and provided, his opinion that a writ of possession ought to issue immediately : therefore, &c. (*as in precedent No. 36 to the end.*)

No. 38.

(As in No. 36, to †.) We also command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made £ which the said J. D. lately in our said Court before us, at Westminster, aforesaid, recovered against the said C. D. for his damages, which he had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit, in that behalf expended ; whereof the said C. D. is convicted, as appears to us of record : and have you the monies before us, on the return day aforesaid, wheresoever, (&c.) to be rendered to the said John Doe, for his damages aforesaid, and have there this writ. Witness, Charles Lord Tenterden.

The like, and *feri facias* for costs, by original in Q. B.

No. 39.

(As in No. 36. to †.) We also command you, that you take the said C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us, on the return day aforesaid, wheresoever, &c. to satisfy the said J. D. £. which in our said Court before us, at Westminster aforesaid, were adjudged to the said J. D., for his damages, which, &c. (*as in preceding precedent to the end.*)

The like, and *capias ad satisfaciendum* for costs, by original in Q. B.

No. 40.

(Copy the last precedent to the end, omitting the words “ and have there this writ,” and then as follows :) and also £ which in our Court of Parliament were adjudged to the said J. D. according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretext of prosecuting our writ of error, brought thereupon by the said C. D., against the said J. D. in the same Court of Parliament, the said judgment being there in all things affirmed : whereof the said C. D. is also convicted, as by the inspection of the record and proceedings thereof, remitted from our said Court of Parliament into our said Court before us, likewise appear to us of record ; and have there this writ. Witness, &c.

The like, and also for costs in error, on an affirmance in the House of Lords.

No. 41.

Writ of re-
stitution.

(As in No. 36, to "whereof the said C. D. is convicted," (&c.) and then as follows :) and whereas we afterwards, to wit, in — Term aforesaid, by our writ, commanded you that without delay you should cause the said J. D. to have possession of his said Term, then to come of, and in the tenements aforesaid, with the appurtenances ; and that you should make known to us on a day now past, in what manner you should have executed that our writ : and because since the issuing of our said writ, it hath appeared to us, that the said judgment, obtained by the said J. D. in manner aforesaid, was irregularly obtained, and that our said writ thereupon issued improvidently and unjustly ; therefore we command you, that if possession of the tenements aforesaid, with the appurtenances, hath by virtue of our said writ, been given or delivered to the said J. D. then that without delay you cause restitution of the said tenements with the appurtenances, to be made to the said G. H. or his assigns, at whose instance the judgment aforesaid hath been set aside by our said Court, he the said G. H. being landlord and owner of the tenements aforesaid, with the appurtenances ; and that whatever has been done by virtue of our said writ, you deem altogether void, and of no effect, as you will answer the contrary at your peril ; and in what manner, &c. (as in No. 34, to the end.)

No. 42.

Scire facias for
the plaintiff.

(As in No. 36, to this mark , and then as follows :) and also £. — for the damages which the said John Doe had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit in that behalf expended ; whereof the said C. D. is convicted, as appears to us of record : And now, on the behalf of the said J. D. in our said Court before us, we have been informed, that although judgment be thereupon given, yet execution of that judgment still remains to be made to him ; wherefore the said J. D. hath humbly besought us to provide him a proper remedy in this behalf : and we being willing that what is just in this behalf should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said C. D. (*if against the casual ejector* "to the said Richard Roe, and also to — and — the tenants in possession of the premises aforesaid,") that he (or they) be before us, on — wheresoever, (&c.) to show if he

has or knows of anything to say for himself, or (if they have or know, or if either of them hath or knoweth, of anything to say for themselves or himself,) why the said J. D. ought not to have the possession of his said term yet to come of, and in the tenements aforesaid, and also execution of the damages, costs and charges, aforesaid, according to the force, form and effect of the said recovery, if it shall seem expedient for him so to do, and further to do and receive what our said Court before us shall consider of him (or them) in this behalf: And have there the names of those by whom you shall so make known to him (orthem) and this writ.

Witness, Thomas Lord Denman, (&c.)

No. 43.

Doe on the demise of A. B. } v. Roe } the plaintiff upon notice, (&c.) show cause, why further proceedings in this action should not be stayed, until a sufficient guardian be appointed for the lessor of the plaintiff, who will undertake to pay to the defendant such costs as may happen to be adjudged to him; and that in the mean time further proceedings be stayed. Upon the motion of Mr. _____	Upon reading the affidavit of L. M. (&c.) it is ordered, that the lessor of the plaintiff upon notice, (&c.) show cause, why further proceedings in this action should not be stayed, until a sufficient guardian be appointed for the lessor of the plaintiff, who will undertake to pay to the defendant such costs as may happen to be adjudged to him; and that in the mean time further proceedings be stayed. Upon the motion of Mr. _____	Rule for staying proceedings, till a guardian be appointed for an infant lessor to answer costs.
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By the Court.

No. 44.

Doe on the demise of A. B. } v. Roe } the plaintiff, upon notice, (&c.) show cause, why further proceedings in this action should not be stayed, until* sufficient security be given to answer the defendant his costs, in case the plaintiff be nonsuited, or a verdict shall be given for the said defendant; and that in the mean time further proceedings be stayed. Upon, (&c.)	Upon reading the affidavit of L. M. and another, it is ordered that the lessor of the plaintiff, upon notice, (&c.) show cause, why further proceedings in this action should not be stayed, until* sufficient security be given to answer the defendant his costs, in case the plaintiff be nonsuited, or a verdict shall be given for the said defendant; and that in the mean time further proceedings be stayed. Upon, (&c.)	The like till security be given for costs.
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No. 45.

(As in No. 44, to *) the costs taxed in a former action brought in the Court of Queen's Bench, on the demise of the lessor of the plaintiff, for the same premises, are paid; and in the mean time and until this Court shall otherwise order, that all further proceedings be stayed. Upon, (&c.)	The like, in C. P. until the costs are paid of a former action in Q. B.
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No. 46.

The like, on
payment of
mortgage mo-
ney, &c.

Upon reading the affidavit of G. H. it is ordered, that the lessor of the plaintiff upon notice (&c.) shall show cause, (&c.) why, upon the defendant's bringing into this Court the principal money and interest due to the lessor of the plaintiff upon his mortgage, and also such costs as have been expended in any suit or suits at law or equity upon such mortgage, his costs in this cause to be ascertained, computed and taxed by one of the prothonotaries, the money so brought into this Court should not be deemed and taken to be in full satisfaction and discharge of such mortgage; and upon payment thereof to the lessor of the plaintiff, why all proceedings in this action should not be stayed; and why the mortgaged premises, and the lessor of the plaintiff's estate and interest therein, should not be assigned and conveyed, at the cost and charges of the defendants, to such persons as they shall appoint: and why all deeds, evidences and writings, in the custody of the lessor of the plaintiff, relating to the title of such mortgaged premises, should not be delivered up to the defendants, or to such person or persons as they shall for that purpose nominate and appoint.

By the Court.

No. 47.

The like, on
payment of
rent, &c. in
Q. B.

Doe on the demise of A. B. } Upon reading the affidavit of the de-
v. Roe } fendant, it is ordered, upon the said
defendants forthwith bringing into Court the whole rent due and in
arrear, and such sum to answer the costs as the master shall direct,
that further proceedings in this cause be stayed. And it is referred to
the master to compute the said arrears of rent, and to tax the said
costs; and upon the said defendant's paying the said lessor of the
plaintiff what the said master shall find due and allowed for the said
rent and costs, that all further proceedings therein as to the non-pay-
ment of the said rent, be stayed. But it is further ordered, if the
said lessor of the plaintiff has any other title to the premises in ques-
tion, than for the non-payment of the said rent, he is at liberty to
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By the Court.

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